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# IRISH LAW REPORTS

(THIRD SERIES OF 'THE LAW RECORDER'),

PARTICULARLY OF

## POINTS OF PRACTICE,

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,  
AND EXCHEQUER,

IN

**Ireland,**

*From Michaelmas Term, 1838, to Trinity Term, 1839,  
inclusive,*

In the Second and Third Years of the Reign of Queen Victoria.

---

**Queen's Bench:**

**By FRANCIS BRADY, Esq.**

**Common Pleas:**

**By GABRIEL STOKES, Esq.**

**Exchequer:**

**By ROSS S. MOORE, Esq.**

**BARRISTERS-AT-LAW.**

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# JUDGES AND LAW OFFICERS

DURING THE PERIOD OF THESE REPORTS.

---

## COURT OF QUEEN'S BENCH.

*Lord Chief Justice.*—The Right Honorable CHARLES KENDAL BUSHE.

*Second Justice.*—The Honorable CHARLES BURTON.

*Third Justice.*—The Honorable PHILIP CECIL CRAMPTON.

*Fourth Justice.*—The Right Honorable LOUIS PERRIN.

## COURT OF COMMON PLEAS.

*Lord Chief Justice.*—The Right Honorable JOHN DOHERTY.

*Second Justice.*—The Honorable WILLIAM JOHNSON.

*Third Justice.*—The Honorable ROBERT TORRENS.

*Fourth Justice.*—The Honorable ARTHUR MOORE.

Resigned 1839, succeeded by

The Right Hon. NICHOLAS BALL.

## COURT OF EXCHEQUER.

*Chief Baron.*—The Right Honorable STEPHEN WOULFE.

*Second Baron.*—The Honorable RICHARD PENNEFATHER.

*Third Baron.*—The Honorable JOHN LESLIE FOSTER.

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## SERGEANTS.

*First Sergeant.*—RICHARD WILSON GREENE, Esq.

*Second Sergeant.*—JOSEPH DEVONSHER JACKSON, Esq.

*Third Sergeant.*—WILLIAM CURRY, Esq.





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#### **CORRIGENDA.**

**Page 53, marginal note, *for Held* that trover could not be maintained, *read* trover could be maintained.**

**Page 57, line 21, *for* property, *read* possession.**

**Page 61, line 24, *for* detention, *read* destruction.**

**Page 216, line 14, *for* 1637, *read* 1737.**

**Page 319, in last compartment of extract from Applotment Book, *for* No. 3, *read* No. 4.**

**Page 361, line 25, *for* in common with, *read* in connexion with.**

# CASES

## IN THE COURTS OF

### QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER.

IN MICHAELMAS TERM, 1838.

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*Friday, November 2d.*

PRACTICE—SERVICE—AFFIDAVIT—HABEAS CORPUS.

In re WILDRIDGE.

Mr. WHITESIDE moved, on behalf of Thomas Wildridge, for an attachment against Henry and W. S. Whithorne, for a contempt, in not obeying a writ of *habeas corpus*. He had obtained an order, on the 23d of October, that a writ of *habeas corpus* should issue, directed to these parties, ordering them forthwith to bring up the body of Wildridge; and also, that they and their attorney should answer the affidavit upon which the order was obtained. Counsel stated the affidavit, from which it appeared that the two Whithornes detained Wildridge in their custody; that on the 9th of October last, Wildridge came to deponent, and informed him that he made his escape over the wall of a house in Prussia-street, in which he had been imprisoned by the Whithornes; that they compelled him to accept bills and execute documents, the contents of which he did not know. Deponent further stated, that, on the 15th, Wildridge was arrested under a marked writ for the sum of £100, the amount of an alleged acceptance of his; that he was not brought to the sheriffs' office, but to a house in the neighbourhood, where Henry Whithorne met him: that soon after the bailiffs liberated him, having got a release signed by B. Dowling, the attorney of the writ; that the Whithornes then got Wildridge again into their possession, carried him off, and that he had not since been heard of. On the 23d, upon this affidavit, the above order was obtained, and it appeared that Henry Whithorne was personally served with the writ upon the 26th; but as to W. G. Whithorne, it appeared, from the affidavit of Wildridge's attorney, that he went to the house where the Whithornes lived some time before, and could learn nothing about them; that he served Dow-

To obtain an attachment against a party for not obeying a writ of *habeas corpus*, if the writ be not personally served, the affidavit must state that a servant or agent of the party to whom the writ is directed, at the house where the person is detained, was served.



ling with copies of the writ and affidavits; that on the 31st of October he went to Prussia street, and inquired at the house where Wildridge had been previously confined, but could not get any intelligence of where he or W. J. Whithorne then were; that W. J. Whithorne was in very embarrassed circumstances, and was keeping out of the way, lest he would be arrested: that he believed he had notice of the writ, and that it would be impossible to effect personal service on him. The affidavit did not state that Wildridge was then detained at the house in Prussia street, or at any of the other houses at which the writ was left.

PERRIN, J.—The statute (*a*) requires that the affidavit should state that some servant or agent of the party, at the house where the person was confined, was served with the writ. If it was sworn on belief, that Wildridge was confined in one of these houses, that, perhaps, would bring the case within the statute.

*Per Curiam*.—We will grant an attachment against H. Whithorne, but we must refuse the motion as to W. J. Whithorne.

(*a*) 56 G. 3. c. 103, s. 2, enacts, "That if any person or persons to whom any writ of *habeas corpus* shall be directed, according to the provisions of this act, upon service of such writ, either by the actual delivery thereof to him, her, or them, or by leaving the same at the place where the party shall be confined or restrained, with any servant or agent of the person or persons so confining or restraining, shall willfully refuse or neglect to make a return, or pay obedience thereto, shall be guilty of contempt, and a Justice or Baron may issue a warrant," &c.

—◆—  
*Saturday, November 3d.*

### PRACTICE—BAIL—NOTICE.

FOUDRINIER v. PIKE.

A notice of bail, which describes the bail as householders, instead of housekeepers, is bad.

Mr. M'DONOUGH, on behalf of the plaintiff, opposed the bail in this case, and objected to the notice, as not being conformable to the first general rule of 1832. The notice describes the bail as householders, whereas the rule requires that the notice should state whether the bail are housekeepers or freeholders. This court has already allowed the objection in *Anon*(*a*).

The COURT refused the bail, but without costs.

(*a*) 1 C. & Dix, 85.

*Saturday, November 3d.*

**SHERIFF—ARREST—CAPIAS AD SATISFACIENDUM—  
JOINT JUDGMENT—RELEASE.**

**DWYER v. M'KEOGH and others.\***

A rule *nisi* had been obtained in this case, for a fine upon the sheriff of the county of Tipperary, for not making a return to a writ of *ca. sa.*, issued against three defendants. It appeared that the sheriff issued his warrant, and Flannery and Kennedy, two of the defendants, were arrested. Flannery passed his bills to the plaintiff for one-third of the debt, and was discharged; the other defendant escaped on his way to the gaol of Clonmel. The fact, as to whether the bailiffs who effected the arrest were or were not the special bailiffs of the plaintiff, was controverted in the affidavits on both sides.

A sheriff will not be ordered to make a return to a writ of *ca. sa.* against three defendants, where he has arrested two of them, and the plaintiff entered into a compromise with one of the defendants, and took securities from him for part of the debt, and then discharged him, and the other defendant escaped; and where there were contradictory affidavits, as to whether the bailiffs who effected the arrest, were or were not the special bailiffs of the plaintiff.

Mr. SMITH, Q.C., on behalf of the plaintiff.—There are two questions involved in this motion, upon which the sheriff relies that he is not bound to return the writ—*first*, that James Ryan, one of the bailiffs, was the special bailiff of the party: *secondly*, that the action was brought against three persons; that a compromise was entered into by the plaintiff with one of the defendants after the arrest, and that that had the operation of discharging the liability of the sheriff. With respect to the first question, Cambie, the under-sheriff, admits, in his affidavit, that Ryan was in his employment; but this being a question of fact, the court will not dispose of it upon motion, but leave it to the sheriff to prove it at the trial. The plaintiff cannot bring his action for an escape until the sheriff has made his return, and there cannot be any grounds for refusing to do so; for, if it turn out that Ryan was the bailiff of the party, the sheriff must succeed. *Rex v. Sheriff of London (a)*. But although it should appear that Ryan was the special bailiff of the party, the doctrine of special bailiffs does not apply to this case, for Cambie admits that Kennedy was in custody; and the doctrine of special bailiffs ends when the defendant is once in custody. *Taylor v. Richardson (b)*. As to the second point, the discharge of Flannery is the release of one-third part of the debt, but an action for an escape may be maintained for the remainder against the sheriff. Either in case of contract, or of *tort*, the release of one defendant will operate as a discharge of the others; but an actual release, and, *a fortiori*, a constructive release, may be qualified and controlled by the plaintiff, so as to affect only

\* This case was partly argued last Term by Mr. Fogarty, Q.C., for the plaintiff; and Mr. Rolleston, for the sheriff, and stood over for further argument.

(a) 1 Chit. R. 614.

(b) 8 T. R. 505.

the amount released. *Waters v. Smith* (c); *Solly v. Forbes* (d), *Com. Dig. Audita Querela* (A). It would be a great hardship to a defendant disposed to act fairly and honestly, if such a proceeding could not be entered into. In the case of *Clarke v. Clements* (e), the court refused to quash the writ, and merely ordered that it should not be used against the defendant. There can be no fair objection to order the sheriff to make what return he may be advised, and thus allow the plaintiff to bring his action where the controverted facts in this case may be submitted to a jury.

Mr. Moore, Q.C.—It is perfectly clear, that if a special bailiff has been appointed, the court will not order the sheriff to return the writ. *De Moranda v. Dunkin* (f). If a party apply to the sheriff, and take out a warrant, nominating the bailiffs himself, it would involve the sheriff in the most ruinous consequences, if he was afterwards held responsible. The case of *Taylor v. Richardson* is where the party was discharged after he had been in gaol; but, in this case, the party was discharged before the sheriff knew he was in custody. The form of the warrant is, that Ryan was appointed at the special instance of the plaintiff's attorney, and that fact is corroborated by Loman's affidavit. It is not necessary, in order to have a trial, that the sheriff should make a return; the facts in controversy can be gone into without a return. If the declaration state, that the sheriff arrested Kennedy and allowed him to escape, and the jury believed that a special bailiff was appointed, they should find for the sheriff. But to require the sheriff to make a return now, can have no other effect but to prejudice his case. If he return, "I have not taken him," then there would be an action for a false return. If he return, "I have taken him, but he was let go," that would conclude him, and he could not contradict his return before a jury. The discharge of Flannery is a discharge of Kennedy. As to the second position, if a *ca. sa.* issue against two, and both are arrested, and security be taken from one, and he be discharged, that is a discharge of the whole debt; because, if one defendant be taken in execution, that is a discharge of the debt: and at common law, if a defendant died one moment after the arrest, no matter what property he possessed, the debt would be discharged. If a party be once arrested, and discharged by the consent of the plaintiff, the judgment is satisfied. *Vigers v. Aldrich* (g); *Basset v. Salter* (h); *Tanner v. Hague* (i); *Jaques v. Withy* (k); *Birch v. Sharland* (l). That is the rule as to one defendant. As to more than one,

(c) Barl & Ad. 889.

(e) 6 T. R. 525.

(g) 4 Bur. 243.

(i) 7 T. R. 410.

(d) 2 Bro. & Bing. 38.

(f) 4 T. R. 119.

(h) 2 Mod. 136.

(k) 1 T. R. 557.

(l) 1 T. R. 715.

if there be a joint judgment, the judgment cannot be discharged in part and sustained in part. If the proposition as to one defendant be correct, then, if two be arrested, and one discharged, the judgment is satisfied. *Ballam v. Price* (m) ; *Clarke v. Clements* (n) ; *Nadin v. Battie* (o). In the latter case, where one defendant was discharged by the Insolvent Debtors' Court, it was held not to be a discharge of the other defendant, because the consent of the plaintiff was wanting. There may be a qualified release, but the question is, can there be a qualified release of a judgment? The case of *Waters v. Smith* was that of a release before action brought: how can that apply to the case of an execution? All the authorities bear out the proposition, that there can be no conditional discharge of an execution. The case of *Clarke v. Clements* was a conditional discharge, yet the court held it to be an absolute discharge.

Cause allowed, without costs.

(m) 2 Moore, 235.

(n) 6 T. R. 525.

(o) 5 East, 146.

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*Monday, November 5th.*

## MANDAMUS—MAGISTRATES—INFORMATION.

The Commissioners of Excise v. THOMPSON.

Mr. TOMB applied, on behalf of the Commissioners of Excise, for a *mandamus* to compel the magistrates of the town of Gort, in the county of Galway, to hear an information, exhibited against the defendant for an alleged breach of the excise laws. The information was first preferred against the defendant at the Petty Sessions of Gort, in the latter part of the year 1837, and, being stated to be at the suit of *His Majesty's Commissioners*, instead of *Her Majesty's Commissioners*, the case was dismissed. The Commissioners appealed to the ensuing Quarter Sessions, but before they were held, having been advised to prefer another information against the defendant, they did so, correcting the error in the first; but the magistrates refused to entertain this information, on the ground that the appeal was pending. The appeal was then formally withdrawn, and a third information exhibited, which the magistrates refused to hear, unless the opinion of the Law Officers of the Crown was produced to them, stating that they were bound to hear it. The *mandamus* was sought to compel the magistrates to hear this information.

A *mandamus* will be granted to compel Magistrates to hear a second information for breach of the Excise laws, although they have already dismissed one for the same offence, upon a technical objection.

The Court granted an absolute order.

*Monday, November 5th.*

**PRACTICE—SECURITY FOR COSTS—EJECTMENT.**

**Lessee of the Duke of DEVONSHIRE v. the Casual Ejector.**

A defendant in ejectment will not be required to give security for costs, where he holds under a lease for 21 years, determinable, however, at the end of each year, by a previous six months' notice either from the lessor or lessee where the ejectment is brought upon a notice pursuant to the proviso in the lease for determining the interest.

Mr. BERWICK applied for an order upon John Lynch, the tenant of the lands, to give security for costs, under the 1 Geo. 4, c. 87. Lynch held under a lease from the Duke of Devonshire, bearing date the 21st of September, 1835, for a term of 21 years, from the 25th March last past; and the lease contained the following proviso: "Provided always, and it is hereby further ordered, that it shall and may be lawful to and for the said Duke of Devonshire, his heirs, &c., to determine and make void this present demise, and every matter and thing herein contained, on the 25th day of March in any one year, he the said Duke, &c. signifying his or their intention by a notice in writing, under his or their hand, &c., given to the said John Lynch, his, &c. or left upon the said demised premises, or any part thereof, six calendar months previous to any such period." There was a similar proviso in favor of the lessee. A notice to quit, under the proviso in the lease, was served upon Lynch on the 23d of September, 1837, possession demanded on the 23d of October, 1838, and the affidavit required by the statute, as to the execution of the lease, &c. was made on the 24th of October; the ejectment was filed on the 2d November, 1838. The interest here can only be considered a tenancy from year to year, and therefore within the operation of the statute. The following cases bear upon the point: *Doe d. Tyndal v. Roe* (a); *Doe d. Pemberton v. Roe* (b); *Doe d. Cardigan v. Roe* (c); and the case of *Lessee Keilly v. Ejector*, decided in this court the 25th June, 1827 (d).

CRAMPTON, J.—I do not think this case is within the operation of the statute. I must refuse the motion; but, if you please, you may mention it to the full court (e).

(a) 1 D. Pr. C. 143; 2 B. & Ad. 922.

(b) 7 B. & C. 2.

(c) 1 D. & Ry. 540.

(d) This was the case of a tenant who held under a written agreement, in which there was no term specified, but the tenant bound himself to deliver up the premises at any period required, after six months' notice. The court, on a contested motion, ordered the tenant to give security for costs.

(e) The case will not be moved again.

*Monday, November 5th.***PRACTICE—VACATING JUDGMENT AS IN CASE OF  
NONSUIT—CONSENT.****HAWKESWORTH v. BOE.**

Mr. GUMLEY applied for liberty to vacate a judgment in case of non-suit entered up against the plaintiff in Hilary Term, 1828. The defendant was dead, and no person had taken out administration to him, but the defendant on record had given his consent to the application.

No rule.

*Monday, November 5th.***MANDAMUS—FEVER HOSPITAL—APOTHECARY.**

The QUEEN, at the suit of ——— PHELAN, v. the Treasurer of the Michelstown Fever Hospital.

Mr. D. R. KANE moved, on behalf of ——— Phelan, to make the conditional order in this case absolute. The conditional order was obtained on the 2d of June, and was for a *mandamus*, to compel the treasurer and governors of the fever hospital of Michelstown, in the county of Cork, to appoint the said Phelan to the situation of apothecary to that hospital. An election was held some time ago, when Phelan and another person of the name of Bateman were the only candidates; the latter was elected. If it be true, as is sworn, that he was not duly qualified by law as an apothecary, his election was void, and Phelan should be appointed. The conditional order had been served upon Bateman, and he answered Phelan's affidavit. In his affidavit, he states that he resided in an apothecary's nine years; that during that time he was employed in compounding medicines, and that he was afterwards attached to a dispensary for three years. This is quite insufficient, and does not constitute him a qualified apothecary. The 54 G. 3, c. 62, s. 6, requires the apothecary of a county hospital to have duly served an apprenticeship. The 5 G. 3, c. 20, s. 4, prescribes the qualification of the surgeon; and the 31 G. 3, c. 34, requires that an apothecary shall be examined, and obtain certificate, &c. before he shall be qualified. The advertisement required a qualified compounder of medicine, and directed that certificates of qualification should be lodged with the treasurer the day before the election. What certificates were here meant, or what was the qualification intended? Clearly those prescribed by the statute.

The Court will not grant a *mandamus* to compel the Treasurer of a fever hospital to appoint a qualified apothecary in the place of a person who was elected, although the latter is not duly qualified as an apothecary under the 31 G. 3, c. 34.



**Messrs. Pigott Q.C. and Barry.** The only act which required a qualified apothecary referred to county hospitals. This is the case of a dispensary, and regulated by 56 G. 3, c. 47; and the provisions of that act give the whole control and management of these dispensaries, and the selection of the persons to be employed in them, to the members of the several dispensaries. It prescribes no qualification. If they are dissatisfied with Bateman, they may remove him, but it is not a case in which this court can interfere.

**Mr. Kane** replied.

Rule discharged, without costs.

*Tuesday, November 6th.*

### PRACTICE—FRIVOLOUS DEMURRER.

**The Administrator of GOWER v. the Administrator of BRETT.**

Where the plaintiff is prevented from setting down a demurrer to his pleading, in time to be argued in the term, by the promises of defendant's attorney to withdraw the demurrer as frivolous, upon certain terms with which he does not comply, the court will order the demurrer to be put in the list for argument.

**Mr. NELSON** moved, on behalf of the plaintiff, that the special demurrer filed in this case should be set aside as frivolous, and filed only for the purpose of delay, or for leave to set it down immediately for argument. When the paper books were made up, and the plaintiff's attorney was preparing to set the case down for argument, the defendant's attorney agreed to withdraw the demurrer, which he admitted to be groundless, pay all the costs incurred, and swear to merits on or before the 1st of November, on the terms of being allowed to plead *de novo*. The plaintiff's attorney was satisfied with this arrangement, but the affidavit of merits was never filed; and, in the mean time, the period passed when the plaintiff should have taken the necessary steps to have the demurrer set down for argument this term. The case of *Wilson v. Tucker* (a) was in point, and also the case of *Townley v. Minchin* (b), which was decided in this court.

*Per curiam.*—Let the case be set down for argument in the list for Friday next.

(a) 2 Dow. Pr. C. 83.

(b) This was a case in which Mr. Nelson moved the court to set aside the demurrer as frivolous, and filed for the purpose of delay. It was an action by the indorsee against the acceptor of a bill of exchange; and the court allowed the motion.

*Wednesday, November 7th.***PRACTICE—SERVICE—SCIRE FACIAS.****MURPHY v. Lord CARBERRY.**

Mr. FITZGIBBON moved that the conditional order in this case be made absolute. He obtained a rule *nisi* to issue a *scire facias* to revive a judgment, in Easter Term, and part of the order was, that it should be served upon the defendant's attorney six days before the ensuing term. It was served on the 19th May; term began on the 24th, which was not a strict compliance with the order. An affidavit of service was filed, but the officer refused a certificate, although no cause was shewn. The officer should certify that no cause was shewn.

Where part of a conditional order was, that it should be served upon the defendant's attorney six days before Term, and the order was served upon the 19th May, and Term began on the 24th—*Held*, that the service was bad, and that a new order should be obtained.

*Per curiam.*—The officer was right. We will now give you a new order, to issue the *scire facias*, unless cause shewn four days after service.

*Wednesday, November 7th.***PRACTICE—NONSUIT—SERVICE—AFFIDAVIT.****Assignees of PEPPER and LOCKE v. NEWENHAM.**

Mr. R. C. WALKER moved, on behalf of the defendant, for judgment as in case of nonsuit. The cause was at issue in Michaelmas Term, 1834; the defendant subsequently moved for a nonsuit, which was refused, upon the peremptory undertaking of the plaintiff to go to trial. The plaintiff did not go to trial pursuant to his undertaking, and an absolute order was now sought on notice. The affidavit of service stated that the notice was served at the dwelling-house of the defendant, instead of stating service to be at his registered lodgings.

If the affidavit of the service of a notice of motion state that the notice was served at the dwelling house of the attorney, it will be defective; it should state the service to be at his registered lodgings.

*Per curiam.*—Your affidavit is defective. Take a conditional order.

*Thursday, November 8th.***PRACTICE—JUDGMENT AS IN CASE OF NONSUIT—PEREMPTORY UNDERTAKING TO GO TO TRIAL.****O'DONOHUE v. O'DONOHUE.**

Mr. FALLON moved for judgment as in case of nonsuit. He made a similar application in this case on the 8th of May, and the plaintiff then

on a peremptory undertaking to go to trial, given on a former motion, the plaintiff gives a peremptory undertaking to go to trial at the ensuing sittings, he will be put under terms to pay the defendant the costs already incurred, the costs of this motion, and also that the defendant may enter up judgment without further motion, if the plaintiff fail in going to trial pursuant to this undertaking.

Where, on motion for judgment as in case of nonsuit, after default,

gave a peremptory undertaking to go to trial. Notice of trial was served on the 19th May, and afterwards withdrawn. A motion was again made for judgment on behalf of the defendant, when the plaintiff's attorney postponed the motion, for the purpose of filing an affidavit to the effect that he was prevented from going to trial by a compromise which was then pending. There has been no compromise since then, and no proceeding has been taken by the plaintiff.

The Attorney for the plaintiff undertook to go to trial at the ensuing sittings.

*Per curiam.*—Let the plaintiff be at liberty to go to trial at the ensuing sittings, on the payment of the costs already incurred, and the costs of this motion, as a condition precedent; and if he make default, let the defendant have judgment, without further order.

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*Saturday, November 3d.*

### PRACTICE—TAXATION OF COSTS—PARTY AND PARTY.

JONES v. CONYNGHAM and others.

In the taxation of costs between party and party, *Held*, 1st, that an attorney who appears for several defendants will only be allowed one appearance fee.

2d. That the adversary is not chargeable for more than one consultation; or for the revival of the directions of proofs by leading counsel; or for the instruction of pleas; or for the revising and settling the draft pleas by leading counsel; or for one fair copy of the pleadings laid before counsel for the direction of proofs; or for one fair copy of the direction of proofs to assist the defendant in his inquiry after the necessary witnesses.

3d. That the adversary is not chargeable for the costs of procuring, from the journals of the House of Commons, a compared copy of evidence given before the Committee of the House.

4th. That he is not chargeable with the expenses attending the examination of several persons, in order to select from amongst them those only whom it would be useful and necessary to produce upon the trial.

In this case, on motion, that the officer should revise his taxation, an order was made on the 26th of April, 1838, that the Taxing Officer, Mr. Clancy, should report specially on the grounds upon which he disallowed the following items:—

1st. A fee of 2s. 6d. on the appearance entered for each defendant.

2d. All reasonable and proper charges for obtaining the necessary information for the preparation of the special pleas of justification on behalf of the defendants, and for instructing counsel for that purpose.

The principal charges in this item were three consultations on the subject of the pleas attended by three counsel, and expenses attendant thereon. There was also a charge for the "instructions of pleas." The defendants' attorney stated, in his affidavit, that the costs actually and necessarily incurred up to the time of filing the pleas amounted to £106, and that £35 only had been allowed by the officer.

3d. The fees paid to defendants' counsel, and the expenses attendant upon one consultation of the defendants' counsel, settling the special pleas of justification, or, in lieu thereof, an additional fee to the counsel who revised and settled said pleas.

4th. The sum of £13. 2s. paid the London correspondent of the defendants' attorney for, and the other expenses attendant upon procuring from the journal office of the House of Commons, a compared copy of the evidence given by the Committee of the House of Commons on Orange Lodges, for the purpose of setting forth certain portions of the same, *verbatim*, in the defendants' pleas.

5th. The fee paid the leading counsel for revising and finally settling the draft pleas.

6th. One fair copy of the proceedings.

7th. The fee paid the leading counsel for revising the directions of the defendants' proofs.

8th. One copy of counsel's directions of proofs.

9th. Reasonable remuneration to the defendants' attorney, for communicating with the defendants as to the witnesses to be produced in support of their pleas; examining, at Magherafelt, in the county of Londonderry, the different persons returned by the defendants as able to give useful evidence, and taking notes of their testimony, and finally selecting such persons as it was considered most advisable should be subpoenaed to attend the trial, the effect and result of which was to prevent the necessity of subpoenaing several witnesses to prove the same facts, whereby considerable expense was saved to the plaintiff (a).

Mr. SMITH, Q. C., with whom were Messrs. NAPIER and WHITESIDE, this day renewed the application for an order upon the officer to review his taxation of these costs. The grounds upon which the officer proceeded, according to his own report, were erroneous, both in matter of fact and in point of law. This motion is grounded upon the affidavit of the defendants' attorney, which states, "that the action in this case was for an alleged libel, contained in certain resolutions entered into at a public meeting, in which the defendants animadverted on certain evidence given by the plaintiff before a committee of the House of Commons; that said evidence affected the conduct and motives of the defendants, in their character as magistrates, for a series of years; that deponent was advised that it would be necessary to procure the evidence given before the House of Commons, the resolutions agreed to by the defendants, and also obtain from the defendants full

(a) The report is so voluminous, that it was found impossible to give even an outline of it; but the substance of the important parts of it are given in the arguments of Counsel.

"information on the several matters of fact affecting each separately, "and the whole of them collectively, on which they could rely as "grounds of justification; that all this was done, and that, for all this "trouble, not one fraction was allowed." The officer refused any remuneration for all the trouble which the defendants' attorney necessarily incurred in the proper discharge of his duty to his clients, on the principle that the attorney was sufficiently remunerated by the fee allowed him for the drawing and engrossing of the pleas; the consequence of which is, that in every case of such magnitude and so much complexity as the present, the costs fairly and necessarily paid out of pocket will far exceed those which the officer will allow. Upon the first item, the officer reports, that he disallowed the charge of 2s. 6d. for each defendant, because it was the invariable practice to allow only the charge of one defendant, no matter how numerous the defendants were for whom the attorney appeared, and stated these reasons:—"That the attorney was paid for "his signature, and in this case only one signature is required; and although there are distinct stamp duties upon each appearance, that does "not give a right to several fees; because, when an affidavit is entitled "in several causes, there is a stamp duty for each cause, and the attorney has only one fee for his signature to it." In this part of the report, Mr. Clancy shews himself as much mistaken in fact, as he is erroneous in point of law. It has not been the invariable practice in the office, thus to tax the appearance fee for several defendants; for the only surviving Prothonotary, Mr. Farran, states directly the reverse, and that, during his experience, a distinct fee was allowed for each defendant. The present practice has crept into the office lately, and has been passed over, *sub silentio*. Neither is the fee allowed for the signature, but it is allowed for the act of appearing. If a man have nine clients, it is but common sense that he should be paid for all. It is necessary for him to communicate with each of them: he has precisely the same trouble as in the conduct of so many distinct cases. Besides, he might enter nine distinct appearances, or nine different attornies might enter appearances for these defendants, and they would be entitled to the several fees. If this practice be encouraged, by denying the fair remuneration to the solicitors, see to what ruinous consequences it will lead. Positive evidence to contradict Mr. Clancy's statement, that this has been the invariable practice, is also derived from the number of law funds paid in this very case. Previous to the abolition of fees to the officers of the courts, the attorney was entitled to the same number of fees as the officers. The law fund has been established in lieu of the fees paid to the officers; and in this particular case there are nine law funds paid, proving, beyond dispute, that, according to the ancient practice, the attorney was also entitled to nine fees, although the defences were consolidated. Another of Mr. Clancy's reasons for disallowing this charge is,

that where affidavits are entitled in several causes, separate stamp duties are paid in each, and only one fee paid to the attorney. But the mode in which stamp duties are collected is a mere fiscal arrangement, and cannot affect the question; and it is very well known that, for example, in equity cases, drawing money out of court, &c., it is necessary to give notice to all parties interested in the funds, and thus entitle the affidavits in every cause, the parties in which are interested in these funds; but there is no additional trouble whatsoever imposed upon the attorney, and, consequently, no additional fee.

CRAMPTON, J. What charge is made for the plea?

*Mr. Smith.*—Only one fee; but there is but one law fund charged also, which confirms my view that the number of fees are to be regulated by the number of law funds. It proves, that the practice as to fees for the plea and for the appearance, was different; the plea was regarded as a joint-stock act of the defendants, whereas the appearance was not so. A case similar to this was decided in the Rolls; it was the converse of the present. The Master allowed the fees, and the plaintiff moved for a review, but the court thought the charge a fair one. *Pike v. Austen* (b). And the court of Chancery has laid down the principle, that in taxing the costs between party and party, the Master should adopt the same rule as between solicitor and client (c). Mr. Bourne is in court, who taxes at the crown side, and he will state that distinct fees are allowed at that side of the court, for the several defendants for whom appearances have been entered. With respect to the second item, Mr. Clancy reports, that he disallowed the three consultations of counsel on the subject of the pleas and expenses attendant thereon, upon the authority of the General Rule of the 8th May, 1832. Mr. Clancy totally mistakes the effect of this rule. The first part of the rule applies to the shortening of pleadings in certain cases, and the second part to consultations after issue joined. It, in point of fact, allows a charge for instructions not allowed before, as remuneration to the profession for emoluments which were curtailed by the shortening of the pleadings; it was intended generally to favour the profession, and allows even in those trivial cases where the pleadings are shortened, one consultation, but was never meant to apply to cases of great importance and beset with difficulties like the present, where the attorney must of necessity incur the expense of consultations in the earlier stages of the cause, in order to conduct properly and honestly his clients' cause. Mr. Clancy is wrong in principle, that he cannot allow more costs for the preparation of a cause in a matter of £5000, than in one of £5. If such an inflexible rule be established, the result will be, that, defendants brought into court involuntarily and improperly, will be mulcted for

(b) 6 L. R. N. S. 238.

(c) 117 General Orders, Chanc.



expenses fairly and necessarily incurred in the proper management of their case, as they will in the present case, to the amount of £300, for their success. The report upon the fourth item is a tissue of absurdity. He says it was an act of extreme caution in the defendants for which they should not be paid, to get a compared copy of the evidence in order to frame their plea, but every lawyer knows that if the defendants relied upon the printed copy, and that that was erroneous in a single word, their pleas would have gone for nothing, for there would have been a fatal variance at the trial. No counsel would be justified in putting his name to pleas drawn from the document, for not using which, Mr. Clancy sneers at the over-caution of counsel, while he could procure a compared copy of the evidence with the signature of the plaintiff attached to it, acknowledging its accuracy and correctness. Mr. Clancy says the compared copy was unnecessary, because the variance might have arisen as well after the precaution of obtaining it, as if the printed copy had been used, but the folly of that observation is apparent from what has been already stated. But, says Mr. Clancy, the costs of the compared copy should not be allowed, because it was not used as evidence at the trial; thus although the document be absolutely necessary to the proper framing of the defendants' pleas, still if they cannot use that document in evidence, but require parol evidence to sustain the pleas, he is not to be allowed the costs of it. The entire of this part of the report is a tissue of nonsense, and in point of fact, the counsel on the other side have given it up. The fifth item is a fee to leading counsel for revising draft pleas, and it has been disallowed, "because," says the report, "it was another act of over-caution on the part of the defendants for which the plaintiff should not pay." In a cause such as this, it would be an act of the greatest indiscretion in a junior counsel, no matter what his knowledge or ability might be, to rely wholly upon himself in the conduct of the case, and the court never should establish an inflexible rule that the same costs are to be allowed in the preparation of a case upon a bill of exchange, and the most difficult and embarrassing case that can be brought forward. The sixth item, being a sum of £2 19s. 8d. for a copy of the pleadings laid before counsel to direct proofs, has been disallowed, on the ground, that the proper course is to lay one of the briefs intended for trial before counsel. Now, this was utterly impossible in this case, for an attorney will not be allowed for briefs made out before notice of trial has been served, which in this case was an eight days' notice, a period which never would have been sufficient for the direction of proofs, in a case where about eighty witnesses were examined on the trial, some of whom resided in England. The seventh and eighth items ought to be allowed upon the same grounds as the fifth, that the importance and difficulty of this case distinguished it from ordinary cases and necessarily required those expenses for the due and proper

management of it. As to the ninth item, there is no ground for refusing it; if Mr. Clancy was looking out for a mode to create and accumulate costs, he could not find a better one than by refusing these costs, for the entire effect of the proceedings in which they were incurred, was to diminish, most considerably, the expenses, by making a selection of the witnesses to be produced. As it was, about eighty witnesses were examined; if this proceeding had not been adopted, five hundred might have been produced, and the plaintiff should pay the costs of every one of them. The principle of this charge is acknowledged in the courts of Equity (*d*); and in cases like the present, this court has interfered to correct the taxation of the officer. *Little v. Gore*, (*e*), and *Mages v. Harvey* (*f*). All the courts act upon the principle, that where there is success there ought to be indemnity. If the costs be fairly, honestly, and from necessity incurred, the successful party should be indemnified. Mr. Clancy thinks he has no discretion as to these costs, that there is an inflexible rule which applies alike to the most important and the most trivial case; in that view the Law Society differ with Mr. Clancy, and they have felt it a duty they owe to the profession, to assist in having this matter fully brought before the court, and for this purpose they have given all the assistance in their power to the defendants' attorney. If the principle of indemnity be not recognised in the present case, the defendants for their success will have to pay £300.

*Monday, November 5th.*

**Mr. Holmes.**—The question is, not whether the attorney is to be paid his costs, but how much of these costs are to be taxed as costs between party and party. The officer has set forth fully the grounds upon which he disallowed the several items, and these grounds are so unanswerable, that it is only necessary to state them fully, in order to satisfy the court of the sound principles upon which the officer proceeded. The first item he disallowed, because he states it to have been "the invariable practice of the taxing officer to disallow it." Here is the deliberate statement of the officer, bound to report faithfully to the court, that he has in this instance followed the invariable practice; and is this a period at which the court will sanction the increase of law costs, when the legislature is resorting to every means, through the civil bill court and otherwise, to curtail those expenses? As to the second item, he disallowed "the consultations and directions of proofs," under the authority of the rule of the court already referred to. That rule is most salutary: it allows the costs of one consultation and one direction of proofs. If the court

(*d*) 101 General Order Chanc.

(*e*) Batty 444:

(*f*) 1 Hud. & Bro. 106.

allow more, where will the evil stop? Is every case to come before the court, in order to determine whether one, two, or three consultations are to be allowed? Here there are five consultations: is the adversary to pay for the five? If not, for how many must he pay? These difficulties establish the necessity of a binding rule. The adversary is not to pay for the peculiar difficulties of each individual case, or the degree of caution or circumspection which the advisers of his opponent may choose to exercise. The officer further states that he disallowed the "instructions for pleas," because it has been the uniform practice of the officers to consider the remuneration of the attorney for this service, to consist in the emoluments arising from the drawing and engrossing of the pleadings. The client is bound to pay all the expenses, but the adversary is only bound to pay for one consultation, and one direction of proofs. If the extreme caution of the client or his advisers suggest more, the client may pay for them, but the adversary should not. Here again the court is called upon to change the uniform practice of the taxing officers, and open a door to a class of expenses which, if once allowed, no one can say where they will end. The third item, the officer most properly states, if he allowed it, it would be an unwarrantable evasion of the rule of the court already referred to. The fourth item, the officer states he disallowed, on the same grounds on which he disallowed the second, as being an act of caution and circumspection for which the adversary should not pay; "He has never known an instance where the party has been allowed a charge of this nature against another:" and he adds, "That if once allowed, a class of charges will be let into the costs between party and party, which it will be impossible for the taxing officers to control." Here is the deliberate statement of the officer, that he has never known such a charge to be allowed; and he adds, on his experience, that if allowed, it never can be controlled. The court should hesitate long before it would, after this statement, alter a practice which has existed since the establishment of the office. If the client desire those expenses, let him pay for them; he is not to be indulged in them at the expense of his adversary. In this case they had the attested copy of the evidence, and they seek to charge their adversary with it, although their over caution prevented them from using it on the trial, and made them incur the heavy expense of witnesses from London, where they were utterly unnecessary. That attested copy was ample evidence; for the evidence given before a committee, if not a record, is a *quasi* record; and an attested copy of it is unexceptionable evidence. Having, then, gone to the expense of it, and not having made the proper use of it, they are bound to pay for it. The fifth item was disallowed, because it has been the invariable practice to disallow such a charge. If they are to be paid for laying the pleas before Mr. Blackburne, why not be paid for laying them before another and

another. The sixth item was disallowed, in conformity, also, to the general practice of the office. The seventh item was disallowed, upon the ground that, if allowed, it would be a violation of the general rule of the court; and until that rule is repealed, no such charge as this can be allowed against the adversary, in a case where one consultation and one direction of proofs have been already allowed. The eighth item was disallowed, because he states, and the principle cannot be disputed, that the plaintiff is not to pay for, or assist in, any inquiry after the defendants' witnesses. He pays for the evidence when found as detailed in his adversary's briefs, and for the expenses of the witnesses; and in support of his views he refers to the case of *Laing v. Bowes*(g). The ninth item he disallowed, because, from the evidence taken down at Magherafelt, selections were made of the necessary evidence, and these portions were briefed; and the plaintiff is called upon to pay, not only for the selected part, but for that which is rejected; and the officer is called upon to allow for evidence he cannot see, which is contrary to the sound principles of taxation, "that the officer should not allow, as against a party, any charge of which he has not the means to judge, nor the power to control." It was said on the other side, that the effect of this charge was to save expense, because if five hundred witnesses were examined in the country, and eighty selected from them, the plaintiff was saved the expense of having the five hundred examined on the trial; but that is incorrect, for they would not be allowed for witnesses who proved nothing but irrelevant matter, nor would they be allowed for ten witnesses who deposed to the same fact, as must have been the case, if the defendants had not taken that precaution. It was a safe and proper precaution on the part of the defendants, and the expenses of which he, and not his adversary, is bound to pay. The court, I repeat, should hesitate long before it would disturb one principle laid down in this report. These costs were incurred in the ordinary action of libel. The defendants' demand against the plaintiff amounted to £982. 6s. 11d.; the sum deducted by the officer amounts to £300. 13s. 11½d., leaving a balance, which the plaintiff is bound to pay to the defendants, amounting to £681. 10s. 11½d. This is a serious sum, as between party and party; but what will be the consequence if this court should decide against the principles of taxation laid down in this report? The officer states, besides his other grounds, that he disallowed the several items, "because it had been the invariable practice to disallow them; because he never knew an instance in which such charges were allowed between party and party." If this court, then, direct the officer to allow any one of these items, that decision will govern him in the taxation of the costs of cases in this court, but he will

(g) 3 M. &amp; Sel. 89.

be guided by the old and long established practice in taxing the costs of the courts of Exchequer and Common Pleas. The matter may come before these courts, and they may differ with this court upon the propriety of the alteration, and thus different principles of taxation will prevail with respect to the costs in the several courts. Is it desirable that the costs allowed in a cause should depend upon the court in which it may be tried? Yet this is the almost inevitable consequence, if one court shall alter the practice which has for a long time prevailed. If a vicious practice exist in the office, the Twelve Judges should meet and correct it: but no court will pursue a course which will create a dissimilarity of practice in the several courts, in a matter in which uniformity ought to prevail.

Mr. *Whiteside* replied.—The officer is mistaken in stating that it has been the invariable practice to disallow the several items which he has disallowed in the present case. With respect to the first item, the only surviving Prothonotary has certified that, before the appointment of the taxing officers, it was the invariable practice to allow a distinct fee for the appearance of each defendant. Mr. Meares and Mr. Stewart, whose duty it was also to tax costs, as Clerks of the Pleas, corroborate the statement of Mr. Farran; and the same practice prevails at the present day at the crown side of this court: so that the officer is quite in error, when he states the taxation in the present case to be conformable to the uniform practice of the office.—[BURTON, J. The present is not quite analogous to a *crown* case; and although the ancient practice may have been to allow several fees, still it would appear, that since the appointment of the taxing officers, who have acted now for about sixteen years, only one fee has been allowed.]—Many grievances will be allowed to pass over *sub silentio*; and it is only where it comes to be a matter of serious importance, as in a case like the present, that a review of the officer's taxation will be applied for. It proves this, at least, that the officer's report is inaccurate, and not to be relied on. The officer is also mistaken in principle, in stating that the attorney is paid for his signature, and that the appearance is analogous to the case of a joint plea, where the attorney only receives one fee; for, after the appearance, the attorney might file a separate plea for every one of these defendants, which clearly establishes that the appearance for each defendant is a distinct and separate act. In Chancery, distinct fees are allowed upon the appearance of several defendants. *Austin v. Pike*. As to the second item, the very rule which the officer relies upon against the charge is, on the fair construction of it, in favor of the charge. It gives the officer a discretion as to the allowance of all costs which shall have reasonably been incurred between party and party after the commencement of an action, although not before allowed; and then the rule refers

to a later stage of the proceedings altogether, and directs the officer to allow, at this stage of the proceedings, one direction of proofs, and one consultation. If, then, upon this very rule, the officer does not report that the costs we claim were unreasonable, (and he does not do so,) he is bound to allow them. In England, where the remuneration of the attorney is much greater than in this country, these charges are allowed, as appears from *Wordsworth's Rules*, 235; and in the case of *Lessee Blackwood v. Gregg* (h), the court of Exchequer directed the officer to allow several items which he had disallowed; and every member of the court expressed an opinion that the taxing officers were going too close to the wind, and that the profession were entitled to a more liberal remuneration than the officers were in the habit of allowing. As to the third item, it is also allowed in England, and there is no ground for refusing it in this country, where the peculiar nature of the case renders it imperative upon the defendant to incur that expense. The fourth item the officer states he disallowed, because the printed report afforded equal security to the defendant. It is utterly absurd to say there is the same security in relying upon a printed and a compared copy of the evidence; and it would have been madness in counsel to trust to a printed copy in a case like this, when an attested copy could be had of the plaintiff's evidence, signed with his own hand, and he thus estopped from disputing its fidelity and accuracy. The principle of this charge is admitted in *Johnson v. Lawson* (i), and in *Holmes v. Holmes* (k), and the grounds upon which it has been resisted are extremely frivolous. Some of them have been already noticed. Amongst other reasons, it is said the printed copy was not given in evidence, and therefore the defendant did not make the use of it which he might have done, and thus save considerable expense, incurred in proving the matter of the pleas of justification at the trial. The fact is, he found that the printed copy fortunately agreed with the attested copy; he required, by notice, a consent that it should be admitted as evidence, and the answer was, that the plaintiff would admit nothing. The plaintiff puts the defendants to the strictest proof of every part of their case, and now refuses the expenses necessarily incurred, upon the ground that these expenses were incurred by the over caution of the defendants' advisers. The defendants are driven to incur an expense of £200, by the obstinate refusal of the plaintiff to admit the evidence tendered by the defendants; and are they not to be indemnified now for these expenses, which the plaintiff's conduct rendered unavoidable? On the same principle, the fifth, sixth, and seventh items should be allowed. Where a defendant is involuntarily dragged into a court of justice, and obtains a verdict, he should be

(h) *Glascock*, 22.(i) 2 *Bing.* 341.(k) 2 *Bing.* 75.

indemnified for all fair and necessary costs which he has reasonably incurred in the preparation and proper management of his defence. The inquiry should be, are these expenses, under all these circumstances, reasonable? The officer should exercise his discretion, and not apply one rigid rule to every case; and had he done so in the present instance, he must have admitted that these charges were not only reasonable, but unavoidable, in the proper conduct of this case. The eighth item is allowed in England; as appears in *Stewart's Observations on the New Rules*, 42, and it is most reasonable that it should also be allowed here. The ninth item is one which the court is bound to allow in furtherance of public justice. The consequence of refusing this item will be, that the parties will avoid the expense, and many more witnesses will be produced than are at all necessary, and thus the costs absolutely increased, and the cause of justice greatly impeded. The officer has referred to the case of *Laing v. Bowes*, but that case does not apply. The charge was properly refused in that case, because the party might have given secondary evidence, and thus avoid the expense of procuring the witness. The argument, that the court by allowing these charges would create a difference of practice amongst the courts, would prevent a review of taxation in every case. This court has already corrected the practice in the office, where it disapproved of the officer's taxation, as in the case *Green v. Atkinson (a)*; and no evil resulted from the interference of the court. The plaintiff, in the present case, is bound to pay every item, which the defendants reasonably and necessarily incurred in the management of their defence. It is clear, that the officer in his taxation, in respect to some of the items, went upon wrong principles; and with respect to most of them, upon an erroneous impression, that it had been the invariable practice in the office to disallow the charges; whereas it is certified that, at least before the appointment of the present taxing officers, these charges were invariably allowed. —[In support of his views, *Mr. Whiteside*, referred to *Palmer's Tables of Costs*, 50, and also to the tables of costs in the court of Chancery; and upon the following day he handed in two copies of bills of costs, taxed as between party and party, by the late Mr. Stokes, in which the expenses attending the examination of witnesses preparatory to trial were allowed.]

*Saturday, November 17th.*

CRAMPTON J.—This day delivered the judgment of the court, and said the court was unanimous in the rule he was about to pronounce. This case came before the court on the motion of the defendants, for a

(1) 1 H. and Bro. 346.

re-taxation of the costs in the cause, and the defendants complain that the officer disallowed certain items which they were entitled to have taxed, as costs between party and party. The officer was directed to report specially to the court, the grounds upon which he disallowed the several items; and he made his report upon the 31st of May. The amount of the bill of costs as originally furnished, was nearly £1000; the items disallowed by the officer, being nine in number, amounted to £300, leaving a balance of nearly £700. As to the first item, the officer has reported that it is the uniform practice to allow but one appearance fee, no matter for how many defendants the attorney may appear, as it has been also the practice to allow but one term fee, which is all that is claimed in the present case; and there is nothing in the nature of the duty for which this fee is allowed, to warrant a deviation from the established rule. It was mentioned at the bar, that this court had decided against the claim upon a previous occasion; and it is sufficient that, being contrary to uniform practice, the court will not depart from that practice in an individual case. As to the second item, although disallowed as between party and party, it is admitted to be a fair charge between attorney and client: and I must observe, that in the argument upon the present motion, this distinction was not sufficiently attended to. This charge was disallowed under the authority of the General Rule of May 1832, which leaves to the officer a certain discretion, but prescribes limits beyond which he cannot go. I think the officer has rightly construed this rule, although his construction has been disputed at the bar. On this head the officer reports, "the defendants' attorney states in his affidavit, that the amount of costs incurred necessarily, in the preparation and compilation of the pleas, is about £106, of which the officer has allowed £35; but when it appears that the deductions from this sum of £106, consist principally of the costs of three consultations on the subject of the pleas, each attended by three counsel, of numerous attendances of the attorney, and of many other charges of a similar nature, your lordship will not feel surprised that such a reduction has been made." The present may not be the most convenient mode of ascertaining the costs which the successful ought to be allowed; but it is the uniform practice, and of course should not be changed for a particular case. If the present practice as to costs allowed between attorney and client, and those allowed between party and party, is bad, let it be altered; but the taxation in the present case must be in conformity to the rules of the office as they exist at present. As to the third item, the observations I have made upon the former charge apply to it. The greatest objection to the report seems to have been to that part of it which applies to the fourth item, and it was made the subject of very strong observations upon the officers: it was said to be illegal and illogical, while it appears to me to be founded on the soundest principles



of reasoning. First, he says, "it is the uniform practice to disallow the "expenses of procuring information for the adversary." It has been strongly urged that the attested copy of the evidence was absolutely necessary, to enable the defendants to plead; but I very much doubt that it was. In the first instance, it seems to have been thought that it could have been given in evidence, but it was afterwards, as appears to me, wisely determined not to rely upon it. It is a misuse of legal phraseology to call it an attested copy; it is not a copy of anything which occurred in a judicial proceeding, but a document furnished by a private individual, the officer of the House of Commons, who had no authority to give copies. The attested and the printed copies are of equal authority. The document signed by the witness is the only original, but either of the others are equally subject to mistakes. The fifth item was disallowed, as contrary to the established practice of the office. With respect to the sixth item, it was necessarily and unavoidably incurred; but the officer reports that such charges have never been allowed, and therefore the defendants here are claiming something for their particular case, which has not been allowed in any other. The seventh item has been disallowed, on the ground that it would be contrary to the established practice, and also to the General Rule of the court of 1832. The eighth item has been disallowed, upon the ground also of uniform practice. As to the ninth item, the officer states that this is the first time this claim has been made; he is answered, that it is the English practice to allow this charge; but this court is not regulated by the practice in England, but by the established practice of the Irish courts. If the court allowed this charge, it would open a door to expenses, the end of which no one can see. In the discharge of his duty, the officer can have no private feeling in favor of either party; and there cannot be a more intelligent or impartial officer than Mr. Clancy. There may be an error, in principle, in the present distinction between the costs allowed between party and party, and those allowed between attorney and client, and it may be desirable to abolish that principle; but the principle has been sustained by the practice of the office, and nothing can be more important than the certainty of the charges which will be incurred. In these matters the officer is the best judge. If we allow items which we find disallowed upon the uniform practice of the office, because reasons sufficiently satisfactory are urged against the practice, probably we would have to alter the entire practice of the court; and the result would be, the several courts would entertain different views; and the same court might entertain different views upon the several cases that would come before it. Upon all these grounds, we must

Refuse the motion, without costs.

## EXCHEQUER OF PLEAS.

*Monday, November 5th.*

## PRACTICE—AFFIDAVIT TO HOLD TO BAIL.

ROGER GALVIN, Administrator of CHARLES GALLAGHER, deceased,  
v. JOHN MILLIGAN.

The affidavit to hold to bail, which was made by the plaintiff, stated that John Milligan (the defendant,) was indebted to the deponent, as administrator of Gallagher, in the sum of £28. 18s., for the balance of one and a-half year's rent, due "upon and by virtue of a certain indenture of lease, bearing date the 23d day of October, 1894, and made between the said deceased, in his lifetime, of the one part, and the said John Milligan of the other part; and deponent saith, that the said sum of £28. 18s. still remains justly due and owing to this deponent as such administrator as aforesaid, by the said John Milligan, over and above all just allowances," &c.

Mr. *Norman* shewed cause of bail.

Mr. *Molyneux* objected to the affidavit, as defective, in not shewing a tenancy, or stating that the defendant held and enjoyed under the lease. It is consistent with the statement in the affidavit, that there were other parties to the deed, and that the defendant was made a party merely to indemnify the lessor, and not as lessee. An affidavit to hold to bail must contain a statement of facts, shewing a clear right of action, which the present affidavit does not.

*Per Curiam.* We think this affidavit is sufficient. The court will not look too curiously into the language of affidavits, nor suppose imaginary or possible cases, for the purpose of defeating them.

Allow the cause of bail.

An affidavit to hold to bail, by an administrator, for rent stated to be due upon and by virtue of a lease bearing date, &c. and made between the deceased, of the one part, and J. M. (the defendant,) of the other part, without stating that J. M. held and enjoyed under the lease. Held, sufficient.

*Monday, November 5th.*

## PRACTICE—AFFIDAVIT TO HOLD TO BAIL.

HUGHES, Assignee of KEENAN, a Bankrupt, v. Dowd.

An affidavit to hold to bail, for goods sold and delivered to the defendant, "or for his use and by his order," is sufficient.

An affidavit to hold to bail, "for money paid, laid out, and expended to and for the defendant and for his use," without adding, "at his request," is defective.

The affidavit in this case was made by the plaintiff, as the assignee of Peter Keenan, a bankrupt, and stated that the defendant, James Daniel Dowd, was indebted to the deponent, as such assignee, in the sum of £223, "for goods sold and delivered by the said Peter Keenan, before his bankruptcy, to him, the said James Daniel Dowd, or for his use, and by his order; and also for money paid, laid out and expended to and for the said James Daniel Dowd, and for his use, by the said Peter Keenan, prior to his bankruptcy," &c.

Mr. *M. Fallon* shewed cause of bail, and contended that as much certainty was not to be required in the case of an assignee, as where the affidavit was made by the plaintiff in his individual capacity.

Mr. *James Plunket*, contra.—There is no difference between an affidavit to hold to bail made by an assignee and one made by any other person, with respect to the certainty required in the statement of the cause of action, although there is a difference as to the degree of positiveness with which it may be sworn.

This affidavit is defective in two respects:—*first*, the goods are not stated to have been sold and delivered to the defendant, "at his request." *Durnford v. Messiter (a)*.—[PENNEFATHER, B. That objection cannot be sustained, as there is an equivalent averment, "by his order," in this affidavit.]—*Secondly*, it is not stated that the money was paid, laid out and expended "at the request of the defendant." That is clearly bad. *Fricke v. Poole (b)*. Besides, it is a direct violation of the 6th New General Rule; and, if an affidavit is bad as to any part, it is bad for the whole. *Archbold's Pract. by Chitty*, 110.

PENNEFATHER, B.—The latter part of the affidavit is certainly defective, for the reason assigned.

Cause of bail disallowed.

(a) 5 M. &amp; S. 445.

(b) 9 B. &amp; Cr. 543.

*Monday, November 5th.*PLEADING—DEMURRER—ACTION FOR TITHE  
COMPOSITION.

PENNEFATHER v. LEE.

Action of debt, for tithe composition due to the plaintiff, as rector of the parish of Kilmalane.

The first count of the declaration, after stating that the amount of the composition had been ascertained by the certificate of the commissioners in 1826, and that such composition had been made permanent by the 2 and 3 W. 4, c. 119, and payable yearly, by the 3 and 4 W. 4, c. 37, proceeded to state, that divers persons, to wit, Thomas Ryan and several others (whose names were mentioned), on the 1st of November, 1833, and thenceforth, and until the 1st of November, 1835, "had been in the occupation of certain lands specified in the applotment, and by and in the same made chargeable with certain annual sums," amounting to £8. 16s. 8d. of the present currency, "for a rateable share or portion of said composition chargeable thereon."

It then averred, that during the period aforesaid, the several persons before mentioned "held the said piece or parcel of land so in their occupation, and so assessed and applotted as aforesaid, as tenants from year to year to the said defendant; and concluded by stating, that defendant, on the 1st of November, 1833, and from thence until the 1st of November, 1835, had the first estate greater than a tenancy from year to year in the lands so occupied, whereby he became liable to pay the plaintiff "the said annual sum so assessed on the said piece or parcel of land."

The second count was similar to the first, but for the composition of a different parish. The defendant pleaded *nil debet* to the whole declaration, and the following plea to the first count:—*onerari non*, because all the lands, whereof the said Thomas Ryan was tenant to the defendant in said parish, during said period, before the 16th of August, 1832, to wit, on the 10th of March, 1829, by indenture of demise made between defendant and Ryan, and not otherwise, were demised by the defendant to Ryan for a term still subsisting and undetermined; and so the defendant saith, that he, the said defendant, on the 1st of November, 1833, and thence to the 1st of November, 1835, had not the first estate greater than a tenancy from year to year in the said lands so supposed

Debt for tithe composition. The first count of the declaration stated that T. R. and others, (tenants of the defendant,) during a certain period, had been in the occupation of lands specified in the applotment, and by the same made chargeable with the yearly sum of £8 16s. 8d., as tenants from year to year to the said defendant, who, as having the first estate greater than such tenancy from year to year, was liable to the composition.

PLEA :— That all the lands whereof the said T. R. was tenant to defendant before 6th Aug. 1832, by indenture of demise between defendant and T. R., were demised to T. R. for a term still subsisting: *et sic*, defendant saith, that during the pe-

riod aforesaid he had not the first estate greater than a tenancy from year to year in the said lands so chargeable with the yearly sum of £8 16s. 8d. *modo et forma*, as by plaintiff in his first count alleged.

*Held*—That the averment in the declaration was distributive, and therefore the plea bad, as not answering the whole of the count.

to be occupied and chargeable with the said yearly sum of £8. 16s. 8d., *modo et forma*, as by the plaintiff in said first count alleged, and of this the said defendant puts himself upon the country, &c.

There was a similar plea to the second count.

To both pleas the defendant demurred specially.

Mr. *Smith*, Q. C. for the demurrer, contended that the pleas were no answer to the declaration, as the denial of the defendant's liability for one of his tenants was no answer to his liability for the rest.

Mr. *Napier*, contra.—The question is, whether the statement in the declaration is to be considered as an averment that the persons therein mentioned occupied the lands jointly, as tenants from year to year to the defendant. If so, the plea is good, as it destroys the unity of the estate.

The declaration avers a *joint* occupation of the land chargeable; it avers that a piece of land occupied by the several persons is chargeable, by the applotment, with the yearly sum of £8. 16s. 8d.

The 4 G. 4, c. 99, s. 34, shews how the applotment is to be made, namely, by ascertaining the qualities of the land, and the acreable assessments applicable to each quality. That is the meaning of the phrase "several sums," amounting to £8. 16s. 8d., which is alleged to be an entire charge on all the lands.

The basis of the defendant's liability is the joint occupation of his tenants from year to year, who would have been *jointly* liable before Stanley's act. It is enough, therefore, for the defendant to negative the joint occupation. *Weale v. King (a)*.

The plea, though in form answering part, is, in legal effect, an answer to the whole, as the allegation of the joint occupation is indivisible.—[PENNEFATHER, B. Might you not have averred that the £8. 16s. 8d. issued out of all the lands? And having stated the matter of your defence, you might then have denied that the tenants were in joint occupation of the lands. As you have not thus put forward your defence by the plea, we are bound to make such intendments in regard to the declaration, as if the argument were on a general demurrer to it. We think that the fair meaning of the averment is, that the lands in the respective occupation of the tenants were chargeable with the component parts of the gross sum which formed the amount of that portion of the composition.]—The plea could not have been framed in that form, and altogether depends upon the construction of this averment in the declaration. But, in any view of the case, the inducement to the plea may be waived; and then the averment after the *et sic*, is a direct denial of a material allegation in the declaration, and goes to the point of the action. In *Co. Litt.* 303, b., it is laid down, that, "Whensoever special matter

(a) 12 East, 452.

"is pleaded, and the conclusion (*et sic*) is to the point of the writ or action, the special matter is waived." This practice is strongly sustained by the case of *Cecil v. Harris* (a). That was an action of distress for rent: *plea*—levy by distress, *et sic, non detinet*. It was found by the verdict that the rent was paid by the assignee, and that there was no distress made. Judgment for the defendant, for the substance of the issue was on the *non detinet*, and not on the levy.

PENNEFATHER, B.—You cannot waive the facts and special matters stated in the plea which lead to its conclusion. The case cited was a case where the inducement was one mode of the same thing—it was in substance payment, whether it was an actual payment or a levy by distress. The principle is, that where the substance of the issue is proved, the mode is immaterial. As you have pleaded *nil debet*, this defence is still open.

Allow the demurrer to the second and third pleas.

The declaration contained several other counts, to some of which demurrers had been taken by the defendant, and allowed.

In the course of the argument, Mr. Napier stated that he had been considering whether one count of a declaration against a defendant, as the landlord of several distinct holdings, occupied by tenants from year to year, might be objectionable, on the ground of duplicity; but he was of opinion that it would not be open to that objection: and as to the passage in *Co. Litt.* that perhaps the true meaning was, that the special matter might be waived, for the purpose of a traverse, by the opposite party.

(a) Cro. Elis. 140.

Tuesday, November 6th.

## PRACTICE—AMENDING DECLARATION BY ADDING A NEW COUNT.

### REYNOLDS v. BRADY.

Mr. WHITESIDE applied to amend the declaration in this case, by adding a count for interest. It was an action for money lent, and the declaration was filed on the 2d of May last.

By the practice of this Court, a new count may be added to the declaration, after the end of the second Term.

Mr. Hatchell, Q. C., contra.—This application is too late. A party cannot amend his declaration, by adding new counts, after the end of the second term. The principle of the rule is stated, in 1 *Tidd*, 698.

PENNEFATHER, B.—There is no such rule of practice in this court. I never could understand the principle of such a rule; for, if one action were discontinued, the consequence would be, that another would be commenced.

Let the plaintiff be at liberty to amend his declaration, by adding another count, upon the terms of paying the defendant the costs of this motion; and let the defendant be at liberty to plead *de novo*, if so advised, within two days from the time the declaration shall be amended.

—◆—

*Tuesday, November 6th.*

### PLEADING—EVIDENCE—VARIANCE.

KEILY v. WHITTAKER.

The defendant sued under the 6 G. 4, c. 42, was described in the commencement of the declaration as "the nominal defendant for and on behalf of a certain society or co-partnership called the Southern Bank of Ireland," and was stated to be sued as one of the public officers, "pursuant to the said statute in that case made and provided;" but in the body of the declaration the contract was stated as made with the defendant, without saying as public officer. At the trial, the proof was of a contract

*Assumpsit.* The commencement of the declaration which contained counts for work and labor, and the money counts, was as follows:—  
 "Bartholomew Keily, (the plaintiff, &c.,) complains against Francis Whittaker, the nominal defendant in this suit, for and on behalf of a certain society or co-partnership, called the Southern Bank of Ireland, present here in court the same day, and which Francis Whittaker, is one of the public officers, for the time being, of the said society or co-partnership, nominated pursuant to a certain act of Parliament, passed in the sixth year of the reign of his late Majesty King George IV., entitled 'An Act for the better regulation of co-partnerships of certain Bankers in Ireland,' and is sued in this action as such public officer as aforesaid, pursuant to said statute in that case made and provided, of a plea, &c."

The body of the declaration was in the usual form, stating the "defendant" to be indebted to the plaintiff in the several sums of money in the respective counts mentioned, and stating the promise by him, without describing him as public officer of the company.

The defendant pleaded *non assumpsit*.

At the trial, before PERRIN, J. at the last Cork Assizes, it appeared, that the defendant had been appointed public officer of a society or co-partnership called the Southern Bank of Ireland, in the place of one Bennett who had formerly held that situation. It also appeared, that

with the society or co partnership. *Held*, that it sufficiently appeared on the pleadings, that the defendant was sued in his official, and not in his individual, capacity; and that, consequently, there was no variance between the contract stated and the contract proved.

the defendant was one of the members of the said society or co-partnership.

On the part of the plaintiffs, a witness of the name of Howard, was produced, who stated, that he had been employed by Bennett, the then officer of the Southern Bank, to repair and rebuild a part of a certain house taken by the Banking Company for the bank-house; and that, at Bennett's request, and by his directions, he had employed the plaintiff to do the painting work connected with such repairs. This witness further stated, that he (the witness) did not enter into the contract with the plaintiff on his own account, but that the latter was employed on the part of the Banking Company.

Other witnesses were examined, who proved that the work was well done and that the charges were reasonable.

The plaintiff having closed his case, the defendant's counsel called on the learned Judge to non-suit the plaintiff, inasmuch as there was no evidence to support the issue; contending that the declaration stated a contract with the defendant, and a promise by him, and not a contract with the company or society, or a promise by them; that the defendant was sued in his private capacity, and that there was no evidence, that he was in any way privy to the contract; they submitted, therefore, that the contract proved was at variance with that stated in the declaration.

The Judge refused to non-suit the plaintiff, but left the case to the jury, to say, whether they believed the plaintiff had been employed by, or at the instance of Bennett, on the part of the bank, to execute the painting for them, or by Howard, on his own part, to do some of the work which he himself had contracted with the bank to execute.

His Lordship then called the attention of the jury to the evidence as it bore upon the question, and the amount for which they should find for the plaintiff, if they believed that the contract was between him and the bank.

The jury found a verdict for the plaintiff for £53. 12s. 10d.

Pursuant to leave reserved at the trial, a conditional order was obtained to set aside the verdict and enter a non-suit, which order

*Mr. Pigott, Q. C.*, now moved to make absolute.

As it appears from the evidence that the contract was made with the co-partnership, it follows that the form of the declaration is incorrect; inasmuch as the contract therein stated is with Francis Whittaker, not describing him as public officer; and inasmuch as the promise is not alleged to have been made by the society or co-partnership, or by the defendant as its officer.

It must therefore be taken, that the declaration is one against the de-



defendant in his individual and private capacity, and as such, it is not supported by the evidence at the trial, which was of a contract with the society.

The commencement of the declaration in which the defendant is described as public officer, will be relied on as an answer to this objection; but the commencement of a declaration forms no part of any of the counts, and is to be taken only in reference to the suit.

The statute under which this action purports to be brought is the 6 G. 4, c. 42.

There has been already a decision of this court, on a similar statute, and on a question closely resembling the present. *Phelps v. Walker* (a). That was an action by the public officer of a company; but whether brought by him or against him, the principle is still the same.—[PENNEFATHER, B. In that case the plaintiff might have sued in his private capacity, for anything that appeared on the face of the declaration. It did not state that he sued as secretary. Here the declaration follows the words of the act.—FOSTER, B. The declaration in this case, is much more explicit than that in *Phelps v. Walker*.]—It is, notwithstanding, an unnecessary departure from the usual course of precedents. The simple and proper mode of pleading would have been to describe the contract as made with the company, and the defendant as its officer (b).

The court will not permit any looseness of pleading to be introduced, beyond what is absolutely necessary for carrying the purposes of the act into operation.

Mr. Smith, Q. C., and Mr. Collins, Q. C., contra.—If the declaration were so framed as to warrant a personal execution against the defendant, it must be admitted that an objection of this kind would be fatal. But it is obvious, that a judgment on this record would not warrant such an execution against him.

This objection, arising from uncertainty on the face of the declaration, might perhaps have been made the ground of special demurrer, but it is cured by verdict. The only question that can now be argued is, whether on the record, as framed, evidence could have been given on the trial of any contract, other than one entered into with the company. In *Phelps v. Walker*, it appears the bill was indorsed to the company, and that consequently, the plaintiff could only have sued as secretary representing the company.

The object of the amendment there was to introduce the word "as," to shew that the plaintiff sued as secretary, and not in his private capacity; but if he had been described as secretary, in the commencement of

(a) 1 *Crawf. & Dix*, 141.

(b) 2 *Chitty on Plead.* (last ed.) p. 25.

the declaration as here, the nonsuit would not have taken place. That case, when considered, is therefore an authority for us. The description in the commencement of this declaration, must necessarily have excluded at the trial any evidence of a contract not made with the bank.

The words of the tenth section of 6 G. 4, c. 42, are quite conclusive as to the form of the declaration being correct in ascribing to the officer the contract of the company.

The latter part of that section directs, that in all indictments and prosecutions by the society or co-partnership, it shall be lawful and sufficient to state the property of the society or co-partnership to be the property of one of its public officers.

If, on the other hand, the construction contended for by the defendant is to prevail, it may be turned against him in this way:—it is in evidence that he is a member of the company, and as he did not plead in abatement, he is therefore, individually liable as a partner. *Mountstephen v. Brooke* (c).

So that in either view of the case, the verdict had against the defendant ought not to be set aside.

Mr. *Christopher Coppinger*, in reply.—The court have no right to look to the merits of this case; it is a question of pleading merely, and looking at the contract stated in the declaration, and comparing it with the contract proved at the trial, the question arises, is it the same contract proved that is stated in the body of the declaration? It cannot be contended for a moment that it is, and the plaintiff is driven then to the act of parliament, and by its assistance he asserts that he is entitled to support the present action. If however in this case, where the contract is stated to be with the defendant, merely in his private capacity, the act of parliament aids him, it would aid him in every other case whatsoever, and then what form of declaration would suffice, supposing a plaintiff were to sue the Banking Company on one of their notes?

If the declaration stated that the defendant made his promissory note, &c., and, on the trial, in support of that declaration, a note of the company was given in evidence, could it be contended that this was not a variance? It surely could not. And what is the difference in this case? It is alleged by Mr. *Collins*, that the concluding part of the 10th section sets at rest the point, namely, that in indictments, the property is laid to be the property of the public officer. True: but if it is laid so, it is also stated “as such public officer.” And it cannot be contended, that if a prisoner was put upon his trial, charged with stealing goods, the property of Francis Whittaker, and it appeared that this was the property of the bank, he could be convicted.

There is a test by which the correctness of this pleading may be tried. By the 18th section of the act of parliament, a plaintiff having obtained judgment against one of the public officers, may have execution against any person who was a member of the bank at the time the *contract* was entered into, upon which his judgment was had ; but to have that execution, he should file a suggestion on the roll, alleging that this person was a member at the time of the contract. Now, in this case, if such a suggestion was put on the file, alleging that A.B. was a member of the company at the time of the contract, the court, upon a demurrer to that suggestion, or upon a traverse, would look to the judgment-roll to see what was the contract; and there it would appear not to be a contract with the company, but with a person in his private capacity. Therefore, if by reason of the pleading in this suit, no good could arise from it, and the judgment could not be made available for a plaintiff under the act of parliament, is it not fair to say that the act cannot assist that form of pleading which, it must be admitted, had not the act been in force, would have been clearly bad? But if the act of parliament is called in to aid it, the whole of the act must be applied to it; and if any part of the act shews its insufficiency, the pleading cannot be considered as aided by the act.

It has been alleged that the defendant should have taken advantage of this loose pleading upon special demurrer; but if the defendant had demurred, the answer to his demurrer would have been this: look to the body of the declaration. There you cannot be misled, and by that you should have been guided.

That it is necessary that something should appear upon the pleadings, that it was a contract or cause of action relating to the affairs of the company, is clear from the case of *Hunter v. Morgan* (d).

That case clearly shews that the court would not act upon intendment, and that the court, in the present case, ought not to intend that the contract as laid, was a contract with the company.

A defendant is entitled to have the cause of action which he is called to answer, distinctly and clearly stated, so that he cannot be misled; and if the pleader depart from the usual and common modes of pleading, the court ought not to assist him, and favor, by intendment, loose and bad pleading.

**PENNEFATHER, B.** This is an application to set aside the verdict, which has been found for the plaintiff, and to have a nonsuit entered.

It has been suggested by the defendant's counsel, that his client may, perhaps, have been misled by the form of the declaration, by which he might have been induced to suppose he was sued on a contract merely personal. But there is no affidavit to that effect, nor is it to be collected from the Judge's report, that there was any allegation of surprise

(d) 2 Hud. & Bro. 119.

at the trial. On the contrary, the real question between the parties seems to have been tried, namely, whether the plaintiff was employed on behalf of the Banking Company by its officer, or by some other person unconnected with the company, and on his own account. That question the jury have decided : and, upon the merits of the case, they have given their opinion against the defendant. I admit, however, that it is not enough, in deciding on the question now before us, that we should be fully assured the merits of the case have been fairly decided against the defendant, but if we are satisfied as to that, we shall have less reluctance in finding that the law is also against him. This is an action brought in pursuance of a very useful statute, the 6 G. 4, c. 42, which enables the public to sue certain co-partnerships therein mentioned, and which, in turn, gives to those co-partnerships reciprocal advantages, by the facilities it affords to their suits.

So far, therefore, as this is a beneficial and remedial act, it ought to be construed by the court, with a view to the promotion of the objects which the legislature had in contemplation, by giving facility to suits, and getting rid of technical difficulties, such as pleas in abatement, and nonsuits.

It is necessary that a party, who wishes to take advantage of that act of parliament, should state, on the face of his declaration, that the action has been commenced under the act, and that the defendant is sued, and made nominal defendant, in pursuance of its provisions. This has been done in the present case.—[His Lordship here read the commencement of the declaration.] So far then, can there be any doubt as to the capacity in which this person has been made defendant, or any mistake as to the right in which he is sued ?

It has been however, said, that from the body of the declaration it must be intended that the contract was made with the defendant in his private capacity ; but, upon the whole of the declaration, what is the fair and necessary intendment to be made ? Manifestly, that the contract was of such a nature as to render it necessary to resort to the statute referred to in the commencement of the declaration.

I think it must be intended that the contract was made with the defendant as the public officer of the company ; otherwise, why should the statute be introduced into the declaration ? or, why should any allusion have been made to it, if the contract were not such as to render its introduction necessary ? If such an intendment then is to be made, it follows that the contract has been properly stated in this declaration.

The first part of the 10th section of the 6 G. 4, c. 42, is silent as to the mode of stating the contract, but the latter part of the same section throws considerable light upon it, and shews strongly the intention and meaning of the legislature in relation to this subject.

The 10th is a general section, regulating civil and criminal proceed-

ings at the suit of the society or co-partnership. The latter part of that section, which has reference to criminal proceedings, declares, that it shall be sufficient in any indictment or information to state the property of the company to be the property of one of its public officers.

Would not a prisoner have greater reason to complain of being misled, and of being put in jeopardy of liberty or life, by these provisions of the statute, than the defendant in a civil action? But there is no such ground of complaint. The act appears to substitute the public officer for the company itself, and to authorise the acts of the company to be described as the acts of its officer, and, consequently, the contracts of the company as the contracts of the officer.

If an intendment, such as I have spoken of, ought not to be made, still, if the declaration were merely objectionable for uncertainty, it would only have been ground of special demurrer, and would not justify the court in disturbing the verdict; at this stage of the proceedings therefore we must consider the declaration as correctly framed.

Besides, we ought to intend that the Judge below directed the jury properly, and told them (as in point of fact it appears he did,) the nature of the contract which they had to try.

With regard to the 18th section, it has been said by Mr. *Coppinger* that if the plaintiff wished to have execution against any person who was a member of the company at the time the contract was entered into, and it became necessary to refer to the judgment-roll, it would from thence appear that the contract was entered into with the defendant in his private capacity, and not with the company:—but from what I have said, it will be seen, that it would not be necessary to resort to extrinsic matters to show the real nature of the contract, as it sufficiently appears on the face of the declaration, that it was entered into with the defendant as public officer of the company.

If an attempt were made to issue execution against the person or goods of the defendant, the court would at once interfere to restrain it; for these reasons, I am of opinion, that this verdict ought not to be set aside.

FOSTER, B.—I have seen no reason to change the view of this case which struck me early in the argument.

The contract which was confessedly entered into with the bank, has been stated by the pleader, as the contract of its public officer; and the question is, whether or not the pleader having brought the defendant before the court under and in pursuance of the act of the 6 G. 4, c. 42, was entitled to attribute to him, the contract which was so made with the bank, of which he was the officer?

If the declaration had stated the contract to have been made with the bank, it would probably have been the better mode of pleading, but as

this has not been done, it now remains to be considered, whether the declaration is so essentially bad as to render it imperative on the court to set aside the verdict.

Even if this question had been raised before verdict, I confess it would appear to me to be sufficient to state the contract of the company as having been made with the public officer. This act of Parliament when it authorised a party to consider the public officer as the representative of the company, authorised him also, in my opinion, to describe the officer as the person with whom the contract was made. It would be a very imperfect species of representation, if the act did not enable the pleader to attribute to the officer the contract of the company; especially when in a criminal court, it directs the property of the company to be described as the property of its public officer. In this case, it is admitted that the work was well done, and the charges moderate; whether, therefore, we regard the merits or the law of the case, I can see no ground for disturbing the verdict which has been found for the plaintiff.\*

\* The Chief Baron and Richards, Baron, were absent.

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*Monday, November 12th.*

# PRACTICE—NEW-TRIAL MOTION.

DOE v. KENNEDY.

Counsel applied for a conditional order for a new trial. The case had been tried before one of the Barons of the Exchequer.

When the order for a new trial is absolute in the first instance.

PEENEFATHER, B.—Whenever the trial takes place before one of the Barons of the court, our practice is to grant an absolute rule in the first instance.

## COMMON PLEAS.

*Saturday, November 24th.*

## PRACTICE—JOINT BOND AND WARRANT—JUDGMENT.

ANONYMOUS.

When the warrant of attorney is joint and not several, the court will not allow the obligee to enter up judgment against the surviving obligor, although the obligor who had died was a minor when he executed the bond and warrant.

Mr. LYNCH applied for liberty to enter up judgment on a joint bond and warrant, one of the obligors was dead, the warrant of attorney was joint not several, but the obligor who died executed the bond when he was a minor, and therefore the bond and warrant as, to him, was a nullity; on these grounds he submitted, that the court could grant the order to enter up the judgment against the surviving obligor.

No rule.

*Monday, November 26th.*

## PRACTICE—PAYMENT OF DUTY ON ORDERS.

Lessee ROGERS v. DALY and others.

The court will not allow a party to avail himself of an order made in the preceding term on which the stamp duty has not been paid.

Mr. Atkinson, on behalf of the defendant, applied to have an order, which was made in this cause in last Trinity Term, transferred to the order book of the present Term.

It was a motion to consolidate the defences, and the costs of the motion are to abide the event of the trial. There had been a trial, and a verdict for the defendants. They now wanted that order, to enable them to tax their costs. The defendants were under the impression that the order had been taken out by the opposite party. On going to the officer, he refused to give the order, the stamp duty not having been paid at the time the order was made; and the present application is to have that order transferred to the order book of the present term.

TORRENS, J.—That order has, in fact, fallen to the ground; you have no remedy. The order book has been certified, and the stamp duty accounted for: the court cannot now interfere.

No rule.

## QUEEN'S BENCH.

*Thursday, November 8th.*

### PRACTICE—NISI PRIUS TRIALS—SPECIAL JURY CASES—SITTINGS AFTER TERM.

Mr. HICKSON stated that there were two special jury cases in the list for Monday, and as the other courts allowed similar cases to be tried in term, he inquired whether their Lordships would proceed with these cases in their order on the *Nisi Prius* days in term. They were very important cases against an Insurance Company, and as many of the witnesses lived in the county of Cork, it would save great expense if the parties knew the time at which it was probable these cases would be tried.

This Court will not try special jury cases on the *Nisi Prius* days in Term.

*Per BUSHE, C.J.*—We never try such cases during term.

*Wednesday, November 21st.*

### PRACTICE—PARTICULARS OF SET-OFF—AFFIDAVIT.

WILSON v. RAMSAY.

Mr. C. H. WALKER, stated that this was an action of *assumpsit*, that the defendant's attorney had served notice of a set-off, but did not specify the items of which it was composed, or give dates for those items. The plaintiff's attorney applied to him for the particulars, and not having been able to obtain them, he now seeks for an order upon the defendant's attorney requiring him to furnish them. The Officer enquired if there was an affidavit filed.

An affidavit is required on motion for particulars of the defendant's set off.

Mr. Walker.—Since the new rule, I do not think an affidavit has been required upon a motion of this nature.

*Per Curiam.*—It is an invariable rule on motions of this kind, to have an affidavit stating the facts, and we must therefore refuse the motion.

Motion refused. (a).

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(a) *The following is the proper form of Affidavit in a case of this kind.*

In the Court of Queen's Bench.      maketh oath and saith, that he is  
(Cause.)      advised, and believes that it will

— the plaintiff's attorney,      be necessary for the plaintiff, in

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*Friday, November 9th.*

## PRACTICE—SUBSTITUTION OF SERVICE—SCIRE FACIAS.

MOLLOY v. CLARKE.

Service on the conuzor of a judgment, who has absconded from the country, of the conditional order for liberty to issue a *sci. fa.* to revive a judgment, will be substituted by serving his wife and son who reside upon his property, and a receiver who has been appointed over it in an equity cause.

Mr. TIGHE, in moving for liberty to issue a *sci. fa.* to revive a judgment, applied for liberty to have it made part of the order, that service of the conditional order upon the wife and son of the conuzor should be deemed good service. The affidavit of the attorney of the conuzee stated that the conuzor had absconded from this country in 1833, and that he had no land or law agent acting for him within the jurisdiction; that the wife and son of the conuzor reside upon the lands of Gregg, in county of Galway, the property of the conuzor; that a receiver has been appointed over these lands by the court of Chancery, who is now in receipt of the rents; that a judgment was served in the court of Common Pleas in the year 1836, and that on a similar occasion service of the conditional order upon the wife and son, was deemed good service.

The court allowed service to be substituted by serving the wife and son of the conuzor, and the receiver under the court of Chancery.

*Saturday, November 10th.*

## PRACTICE—SUBSTITUTION OF SERVICE—EJECTMENT.

Lessee of EDWARD CONNOLLY v. the Casual Ejector.

Substitution of service of the summons in ejectment refused under the circumstances of this case.

Mr. PAKENHAM, applied on behalf of the plaintiff, that the service of the summons in ejectment in this case, on two of the tenants of the lands, Patrick Bayly and James Bryan, by posting same on the doors of their dwelling-houses, should be deemed good service. He moved upon the affidavit of the process server, which stated, that on the 31st of October, he made diligent search for these defendants, and was unable to find them. On the 1st of November, he endeavoured to obtain admission into Bryan's house, but was unable; and in Bayly's house he found no per-

order to have a fair trial of the merits in this cause, to procure from defendant a bill of particulars of the different sums of money alleged to be due, and set-off against plaintiff's demand, by the defendant's notice of a set-off in this cause.—Sworn &c.

In the Common Pleas and Exchequer the rule for the particulars of the defendant's set-off is granted as of course in the office, without any affidavit. 1 *Stewart's Forms*, 485

son but young children; that he posted a copy of the ejectment upon the doors of their houses; that he believed they were keeping out of the way, and also that they had notice of the ejectment. The ejectment was brought for non-payment of rent, and the tenants were laboring men.

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EJECTOR.

BURTON, J.—This does not appear to be a case of desertion, nor of necessity; for although persons, in the class of life in which these defendants are, may be absent from home at their work all day, there is no reason to suppose they may not be at home afterwards.

Motion refused.

Saturday, November 10th.

### PRACTICE—AFFIDAVIT TO HOLD TO BAIL—BILL OF EXCHANGE.

M'CARTHY v. BIRNEY.

A rule *nisi* having been obtained for discharging the defendant out of the custody of the sheriff of the county of Tyrone, on his entering a common appearance—

Mr. *James Doherty*, for the plaintiff, now shewed cause, by reading the affidavit to hold to bail.

Mr. *Peebles*, in support of the rule, submitted that the affidavit was altogether defective, in the mode of stating the plaintiff's title and cause of action. It alleged that the defendant "is indebted to the plaintiff in the sum of £20, besides interest, being the amount of a bill of exchange, dated the 27th day of August, 1827, drawn by F. Hyde on, and accepted by, the defendant, payable at 91 days after date, which bill was passed to the plaintiff for valuable consideration." It does not shew what was the nature or foundation of the debt; all that appears is, that the amount of the debt and the amount of the bill are the same. It is not averred that the debt is due by, or on account of, "the bill;" there is nothing more than inference, on which perjury would not be assigned. It is not stated whether the bill was payable to the "order" of any person; and it does not, therefore, appear that it was negotiable; and if it was, it does not shew by whom it was endorsed or passed to the plaintiff, as is clearly necessary, upon the authority of *M'Taggart v. Ellice* (a), and *Lewis v. Gompertz* (b).—[Mr. *Peebles* was about to state further objections, when he was stopped by the court.]

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff "in the sum of £20 besides interest, being the amount of a bill of exchange, dated, &c. drawn by F. H. on, and accepted by, the defendant, payable at 91 days after date, which bill was passed to the plaintiff for valuable consideration," is insufficient.

(a) 4 Bing. 114.

(b) 2 Cr. & J. 352.

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Mr. *Doherty*.—It sufficiently appears that the debt is due on foot of the bill, and it is unnecessary to insert the words "or order" in the affidavit. "Passed" is tantamount to endorsed, and it is apparent that it was endorsed by F. Hyde. The cases relied on, to establish the position that the plaintiff's title must be deduced in the affidavit, are not law. It has been decided in *Machu v. Fraser*, (c), and *Bradshaw v. Seddington* (d), that it is only necessary to ascertain the liability of the defendant; and here he is the acceptor of the bill. The case of *Hughes v. Brett* (e) is substantially the same as the present; and, in that case, Chief Justice Tyndal says, that "Plaintiffs should not be involved in distinctions too subtle for ordinary apprehensions, notwithstanding prior decisions." Nothing can be more subtle than the objections to this affidavit.

The COURT considered the affidavit was clearly defective.

Mr. *Peebles* applied for the costs of the motion, the affidavit being manifestly bad, and the debt barred by the statute of limitations.

Mr. *Doherty*.—It is not necessary to negative the statute of limitations in the affidavit.—*Per Curiam*. In the case of *Wyatt v. Whaley* (f). On reference to the Officer of the court, and to an affidavit he held in his hand, it would appear that it had been almost impossible to serve the defendant, or recover the debt against him.

Rule absolute, but without costs.

(c) 7 Taunt. 171.

(d) 7 East, 84.

(e) 6 Bing. 239.

(f) 1 H. & Bro. C.

Thursday, November 15th.

### PRACTICE—AWARD—SOLICITOR'S COSTS.

The Administrators of GOWER v. DONOVAN.

An award will not be set aside, where the arbitrators assess certain damages, being the amount of several bills of costs due to

an attorney by his client, although they assess that sum, subject to be reduced in taxation of the costs by the proper officers.

This was a motion to set aside an award. The plaintiffs brought an action of *assumpsit* against the defendant, for several bills of costs due by him to the intestate. When the case came on for trial on the 16th of June, 1837, it was, by consent, referred to arbitration, and this consent was made a rule of court. The arbitrators assessed the damages at

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£3000, but directed "That the said sum of £3000 should be reduced to "the aggregate of the several bills of costs so directed by us to be taxed, "when the same shall be properly taxed and ascertained; and that no "execution shall be issued on foot of our aforesaid finding, for any sum "greater than the aggregate of the said taxed bills of costs, together "with the costs in the cause, &c." Amongst the bills of costs, there was one which included, besides items properly chargeable between attorney and client, expenses incurred in the cultivation and management of the defendant's lands, and which were more properly the costs of an agent than attorney. In their award, the arbitrators directed, with respect to this bill, "That the respective officers would allow, in taxation, those items for which a client is properly liable to his attorney." The award was objected to on the ground of uncertainty, and as not being final (a).

*Mr. West, Q.C.*—This award cannot stand; it awards no certain sum to the plaintiff. The arbitrators assess damages to the amount of £3000, but that sum to be reduced by the taxation of the bills of costs; and one of these bills contains items which no officer can tax. A reference from arbitrators to tax costs is good, but there is a difference between acts judicial and acts ministerial; and if the reference make the taxation of the costs a judicial act, the award is bad. *Watson on Arbitration*, 133. And here, costs being referred to the officer, which he has no means of ascertaining, and no authority, as an officer of the court, to allow; if he allow or disallow them, his act must be a judicial and not a ministerial act; and this is a delegation of their duty by the arbitrators which invalidates the award. *Watson*, 133. The terms of the award give a judicial character to the taxing officer. There is no reason why the plaintiffs should not be paid those items which are inserted in the bill of costs, if they were expended, although not costs incurred by the intestate as attorney for the defendant. The arbitrators have made no award upon these items, but have referred the bill of costs, in which they are included, to officers for taxation who have no power to allow or inquire into one of them, and the amount of which cannot therefore be ever ascertained.

*Messrs. Nelson and Fitzgibbon, contra.*—It was the act of the defendant himself to refer the case to arbitration, and he is bound by the award; he cannot travel out of it. The court will set aside an award for a mistake, but that mistake must appear upon the face of the award; but it will not entertain objections brought forward by affidavits, as in

(a) There were three other objections to the award, on the ground of evidence admitted, of evidence rejected, and that the debt was not within the statute of limitations; but these the court did not entertain.

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this case. *Watson on Arbitration*, 226. The arbitrators have acted precisely as a jury would have done; they have found upon the issues, and assessed damages to the amount of £3000. This sum they find due by the defendant on certain bills of costs, but they direct that execution shall not issue for a greater sum than the aggregate of those bills, when properly taxed. This was the proper course for the arbitrators to take; they could not tax the costs; if they referred them to a stranger, they would have acted erroneously, but they refer them to the respective officers of the several courts in which they were incurred, and who are bound to tax them according to the settled rules of their respective courts, and this does not vitiate the award. *Watson*, 133. As to the objection, that there were items in the bills of costs referred to, which the officers have no right to inquire into, that is answered by the terms of the award, which directed the officers to allow only the items "properly chargeable between attorney and client." This case is clearly within the rule which requires that the award should be certain; because it gives a fixed and established rule by which the amount can be ascertained. *Higgins v. Willis* (b). The rule, "*id certum est quod certum reddi potest*," applies to awards; and several cases are cited in *Watson*, 171, to establish this rule, that awards are construed to be certain, unless they appear to be *uncertain*; and in the case of *Hawkins v. Colclough* (c), Lord Mansfield says, "That awards should be liberally construed, and that certainty may be judged of according to a common intent, and consistent with fair and probable presumption." As to the finality of the award, it is clearly within the case of *Price v. Hollis* (d). If the arbitrators have given a rule by which the amount of the plaintiff's demand can be arrived at without suit, the award is good, and cannot be set aside.

Mr. *Holmes*.—The award cannot be sustained, unless it be in accordance with the submission. One of the terms of the submission is, that the finding of the arbitrators should be entered as the verdict of a jury. Nothing could be more absurd, than that a jury should find a verdict in the terms of the award. It does not appear, from the award, that the defendant owes one shilling. The arbitrators were bound, by the terms of the submission, to find the sum due to the plaintiff; and after making their award, both parties are as much at sea about that sum as before. Who is, in the end, to ascertain that sum? They are bound to find it by the terms of the submission, and the award is bad for not expressing it. The proper course would have been, to have got the assistance of the officers, tax the costs, and when the sum due was ascertained, make their award.

(b) 3 M. & Ry. 382.

(c) 1 Bur. 275.

(d) 1 M. & Sel. 105.

CRAMPTON, J.—The arbitrators might have very properly pursued the course pointed out by Mr. *Holmes*; but it is an ordinary case to take a verdict for a certain sum, subject to taxation. The declaration was for the amount of several bills of costs due by the defendant. He denied his liability, pleaded the statute of limitations, and also a set-off. The order at *Nisi Prius* was made upon consent, and the parties thus agree upon a new tribunal, selected by themselves, whose finding was to be final, and who were to award costs in the cause, and the costs of the arbitration. They find the defendant liable, and that the plaintiff's demand is not barred by the statute of limitations. They do not tax those bills of costs, although they might have done so, on consent, but refer them for taxation; and, on such a reference, the officers of the respective courts are the proper persons to tax these costs; and they direct the officers, in their taxation, to allow only those costs for which a client is "properly liable to his attorney." As to the objection, that the award is not final, as having delegated a part of their duty, I do not agree in that view of the case. The arbitrators laid down a rule, and chalked out a course, subject to the control of the court; and if the award conclude all questions between the parties, except something ancillary to it, the award is good, and within the authority of *Price v. Holles*.

Motion refused, with costs.

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*Friday, November 16th.*

# NEW TRIAL—LANDLORD AND TENANT—WRONGFUL EVICION—SUSPENSION OF RENT.

SMYTH v. KELLETT and KELLETT.

ASSUMPSIT.—The declaration contained three special counts; the first stated that the defendants were tenants of a certain farm, and promised to manage and cultivate the said farm in good and husband-like manner, &c.; that the defendants did not, during the term, so manage, &c., and then stated, how they had ill-treated the same. The second count was for use and occupation of the farm, and the third, for work and labor, upon the undertaking of the defendants. The defendants pleaded the general issue, and the case came on for trial before *Johnson, J.* at the Summer Assizes for the county of Westmeath, for the year 1838. The plaintiff gave in evidence a written agreement, signed

A tenant who is sued in an action for use and occupation, and obtains a verdict which is bad, by reason of the mis-direction of the Judge who tried the case, cannot, as cause against a motion for a new trial, rely upon

wrongful eviction by his landlord during the tenancy as suspending the rent altogether, unless the fact of eviction has been found by the jury.

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by the defendants, dated the 29th January, 1836, in which they agreed to take the demesne of Archerstown, for two years, to be computed from the 15th of January instant, at 29s. *per acre*, the rent to be paid on the 15th of July, and 15th day of January in each year. They also agreed to surrender 100 acres of the lands, at the expiration of the first year, if the plaintiffs required them; and the agreement stated the mode of cultivation. This agreement was proved, and also a parol undertaking to pay the plaintiff for ploughing a field for the defendants, which the plaintiff did, and the value of which was about £10. The plaintiff got possession of more than 100 acres of the land, on the 15th of January, 1837, and on the defendant's complaining that he had taken too much, he returned a field to the defendants, on the 4th of March following. It was proved that a distress was made on the 15th of January, 1838, for the rent due upon that day, and possession of the lands had been taken on the same day, and that the balance due for rent after deducting the value of the distress was £24. 17s. 4d. The case made for the defendants was, that they were not to pay for certain portions of the land under plantation, which they endeavoured to sustain by letters from the plaintiffs, to which the counsel for the plaintiff objected, but which were allowed to be read; and also that the value of the land, which the plaintiff retained from the defendants from the 15th of January, to the 15th of March, should be deducted from the rent due. The learned Judge left the two questions, as to the agreement for ploughing, and as to the tillage of the farm, entirely to the jury, and as to the use and occupation, he said, he considered the defendants were entitled to an allowance for the land detained by the plaintiff, during the time of that detention. There was a verdict for the defendant which the court intimated could not stand, as the learned Judge ought not to have directed the jury to allow for the value of the land detained by the plaintiff, from January, 1837, to the following March. Counsel for the defendants then insisted that the taking of possession by the plaintiff on the 15th of January, 1838, was a wrongful eviction of the tenants' interest, and suspended the rent, and that upon this ground the defendants were entitled to a verdict. It appeared from the evidence of some of the witnesses that this question was raised at the trial, but it was not put to the Jury by the learned Judge, nor was he required to do so by the Counsel for the defendants. The effect of this eviction was the only question argued.

A rule *nisi* had been obtained on a former day for setting aside this verdict, on the ground of illegal evidence having been admitted; and as having been obtained against law and evidence, and by the misdirection of the learned Judge; against which,

Mr. Martley, Q.C., with whom were Messrs. R. C. Walker, and P. M.

*Murphy*, now shewed cause.—As to the count for the improper tillage of the land, and also the count for the work and labor, they were properly left to the jury; and the verdict had upon these cannot be disturbed. With respect then to the count for use and occupation. The agreement was, to hold the land for two years from the 14th of January 1836, and the rent to be paid in two half-yearly payments, on the 15th of July and the 15th of January, in each year. The last gale of rent was not therefore due until the 15th of January 1838, and the tenants had until the last moment of that day, to pay it; and the entire of that day, therefore, formed a part of the tenants' term. *Cutting v. Derby* (a), *Cabell v. Vaughan* (b), and in *Leftly v. Mills* (c), where Lord Kenyon, reviews all the cases upon this point. This was therefore an eviction by the landlord of the tenants' term before the rent came due, and by this eviction the rent was suspended in the whole. *Coke Litt. Thos. ed.* 470, and *Chitty on Contracts*, 262, and *Smith v. Raleigh*, (d). There is this distinction in the case of use and occupation, that if the tenant retain a part of the premises, in the event of a partial eviction, he will be liable, not upon the agreement, but upon the *quantum meruit*, for the value of the portion retained; but the landlord, by the eviction, annuls the contract, *Chitty on Contracts*, 262. Therefore in this case the count for use and occupation could not be sustained.—[CRAMPTON, J. Was there anything to shew that the landlord did not enter by consent?]

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*Mr. Martley*.—The landlord was bound to shew, when he entered upon the possession of the tenants during the tenants' interest, that he did do so by consent of the tenants. It is clear, from a distress having been made on the very same day, which was also illegal, that the proceeding was not an amicable one. Upon these grounds the verdict for the defendants cannot be disturbed.

*Mr. Collins, Q. C.*, with whom was *Mr. Griffith*, contra.—The question of eviction is not open upon the present motion. There is no statement in the report of the learned Judge, that this point was raised at the trial, and in order to take advantage of it upon the present motion, it should appear that the defendants' counsel called upon the learned Judge to put the question to the jury and to direct a verdict for the defendants, if they believed there was a wrongful eviction by the landlord. The defendants' counsel may have mooted the point, but it is evident the learned Judge did not adopt it, and it is clear from the report, that it was not left to the jury. It is therefore not open upon this motion. A wrongful eviction of the tenants' interest would ope-

(a) 2 W. Bl. 1075.

(b) 1 Saund. 288.

(c) 4 T. R. 170.

(d) 3 Camp. 513.



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rate to suspend the rent, but the fact as to that eviction is one which a jury must find. But if it were open, the landlord had a right in this case to his possession on the day he obtained it. The word "from" in the demise, may mean either inclusive or exclusive, according to the context and subject matter. *Pugh v. Leeds, (Duke) (e)*; and in civil bills under the ejectment statutes, where a demand of possession is required, it has been held by several Judges upon appeal, that such demand upon the last gale-day is sufficient. *Graily v. Conry (f)*.

Mr. *Walker* replied, and contended, that from all the circumstances of the case, at best, the plaintiff could not have a verdict for more than about £10, and it was contrary to the practice of the court, to send a cause to a new trial for so small a sum.

*Per Curiam*.—There is no evidence of a wrongful eviction before the court, and therefore

The motion must be granted—The costs to abide the event.

(e) Cow. 714.

(f) Napier's C. B. Acts, 142.

Thursday, November 22d.

### GUARANTIE—BILL OF EXCHANGE—LACHES— PRACTICE—COSTS.

SINCLAIR v. BARNETT and MOSEY.

A. sued out a *fi. fa.* against B.; and C. and D., who had been in the suit bail at bar for B. to induce A. to take the draft of E. (whose solvency was questionable), upon B., and give up the execution, they giving A. a guarantie for the payment of the bill. The bill was due on the 23d of July, and was not presented until the 25th; but subsequently, one of the guaranties promised to have it settled for A. Held, that C and D. were liable to A. upon the guarantie, notwithstanding A.'s laches; Held, also, that where inadmissible evidence was allowed to be given, although it was the opinion of the Judge that it could not influence the Jury, the Court will not give costs against a party seeking a new trial upon that ground.

ASSUMPSIT.—This was an action of assumpsit upon a *guarantie*. The first count of the declaration stated, that the plaintiff, in Easter Term, 1837, had judgment, and sued out a writ of *feri facias* against John Dickson, for £86, that in consideration of the premises, and that said plaintiff would forbear to levy said sum, and would accept of a bill of exchange for £67, drawn by John Browne upon the said Dickson, at two months from the 20th May, the defendants undertook and promised to give a joint letter to the plaintiff, guaranteeing the payment of the said bill, and the said sum of money therein. It then averred that the plaintiff did forbear, &c.; presentment on the 26th of July; that John Browne had no effects in the hands of the said Dickson, when he

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drew the bill, or until same was payable, and no reasonable grounds to expect payment of it; that no party sustained injury by want of earlier notice of dishonor; and stated as breach, that the defendants did not give the letter and refused to pay the amount of the bill. The second count stated, that in consideration of the plaintiff's forbearance to levy &c., the defendants undertook and promised to secure the payment of the bill, and alleged a breach that they did not do so. The case came on before BURTON, J., at the last Assizes for the county of Antrim. It appeared in plaintiff's evidence, that the defendants had put in bail at bar for Dickson, in the plaintiff's suit against him; that when Browne's bill was first offered to plaintiff he refused it, not satisfied of his solvency, and only took it, when the defendants gave their guarantie. After bill became due, the defendant Barnett, promised to have matters settled; that the plaintiff would have no more trouble as he would take the matter into his own hands. A conversation, which the plaintiff's son had with Browne after dishonor of the bill, was also proved, in which Browne desired him to have nothing to do with him, as he was drawn into the matter, and if he proceeded against him he would "white-wash": defendants' counsel objected to this question, and the learned Judge took a note of the objection. The bill was due on the 23d of July, and not presented at the bank at which it was made payable until the 26th. The acceptor had no funds at the bank from the date of the drawing to the dishonor of the bill. The defendants' counsel submitted that the defendants were discharged, as the bill was not duly presented, and therefore the security of Browne was lost to them: the learned judge reserved the point, with liberty to the defendants to move to set aside the verdict, if the jury should find for the plaintiff. The only evidence produced on the part of the defendants, was that of two witnesses, who proved that Browne held 16 acres of land, and that his interest therein was worth £35 or £40. The learned Judge told the jury that the plaintiff was entitled to a verdict, unless defendants have lost right to ultimate remedies by plaintiff's *laches*; that one question for their consideration was, whether the bill was or was not a genuine commercial instrument; and another, whether the defendants have been injured by the plaintiff's *laches*, and if so, whether they have waived their right to complain; and that if they were of opinion that Browne was a man of no substance, and the bill a mere kite, and that Browne, neither at the drawing or maturity of the bill, had any effects in Dickson's hands, they should find for the plaintiff. The jury found a verdict for the plaintiff. The defendants' counsel on a former day obtained a rule *nisi* that the verdict should be set aside, and a verdict entered for the defendants; against which,

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Mr. *Whiteside*, with whom was Mr. *Napier*, now shewed cause.—A party who gives a guarantie, and whose name is upon the bill is not entitled to notice of dishonor. *Warrington v. Furber*, (a), *Goring v. Edmonds* (b); *Holbrow v. Wilkins* (c); and *Swinyard v. Bowles* (d) also, *Van Wart, v. Woolley* (e), and *Bickerdike v. Bollman* (f); which establish that Browne was not entitled to notice, if he had not funds in the hands of Dickson. The jury were directed, if they believed that the bill was not a *bona fide* bill, to find for the plaintiff, and they accordingly did so.

Mr. *Gilmore*, Q.C., and Mr. *Tomb*, with whom was Mr. *Nelson*, contra.—The bill in this case was not duly presented, and, therefore, notice of its dishonor could not have been given in due time. The bill was presented on the 26th of July, and it became due on the previous 23d. A party plaintiff is bound to establish his case, and shew that due notice of dishonor was given to the drawer. If this position be correct, Browne was in this case discharged from all liability, and then see the effect of this upon the defendants. The contract by the defendants was not, as in the cases cited, to pay the debt; for if that were the intention, they would have indorsed the bill, which they refused to do, but they gave a guarantie for payment of the bill, in case the acceptor and drawer made default. They were the parties primarily liable, and the guarantees were not liable until these parties made default, which Browne has not done, from the *laches* of the plaintiff. There is no breach of the guarantie, unless the defendants were primarily liable. As to the subsequent promises, they do not alter the nature of a written agreement; and if relied upon as a new and distinct promise, it was without consideration. There was not a particle of evidence to shew that Browne had not effects in the hands of the acceptor. The bill was manifestly drawn for the accommodation of Dickson, and not of Browne, and the latter was therefore entitled to notice. The case of *Bickerdike v. Bollman* has been much quarrelled with, and will not be extended; but the above principle has been distinctly laid down by Lord Eldon as the principle which governs the courts of law upon this subject. *Ex-parte Heath* (g), and in *Goodall v. Dolley* (h), it was held that an indorsee was entitled to notice, although there were no effects in the acceptor's hands; and also, that a subsequent promise of payment, made without the knowledge of the *laches* of the plaintiff, was not a waiver of the want of notice. When the plaintiff took the bill into his possession, he was bound to take the requisite steps, in

(a) 8 East. 242.

(c) 1 B. & Cr. 10.

(e) 5 D. & Ry. 374, S. C. 3 B. & Cr. 439.

(g) 2 V. & B. 241.

(b) 3 M. & P. 259.

(d) 5 M. & Sel. 62.

(f) 1 T. R. 405.

(h) 1 T. R. 712.

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order to secure the liability of the several parties, which the law directs; and if the argument at the other side be worth any thing, it would go to this, that the plaintiff might sue upon the guarantie, without any demand of the bill at all. As to the question of waiver, there was not a particle of evidence to go to the jury on that subject; the conversations of Barnett, amount to no more than this, that he would pay the bill, and recover the amount himself from Browne. But to establish a waiver, there must be evidence of a distinct promise to pay, or something equivalent, and also evidence of the defendants' knowledge of the plaintiff's *laches* when that promise was made. *Goodall v. Dolley*, and *Donnelly v. Howie (i)*. As to the conversation with Browne, it was clearly inadmissible, being spoken behind the back of the defendants, and was of a character calculated to influence very much the opinions of the jury: and, upon this ground, the defendants are entitled to a new trial.

Mr. Napier replied.—These parties were all clearly proved to be concerned in a common conspiracy to defraud the plaintiff, namely, by getting rid of his execution by giving him a sham bill, and in this way have made the subsequent declarations of any of them good evidence against the others. As to the other objections, the declaration states the presentment for payment of the bill on the 26th, and that allegation we have proved; and, therefore, any irregularity in this respect cannot affect the present question, although it might have been good ground of demurrer to the declaration. Every allegation in the declaration has been proved. The only effect of Browne's declaration was to shew that he did not think he was discharged from his liability as the drawer of the bill, and it could have no influence upon the jury as against Barnett. It was in evidence, that if the bill had been presented it would not have been paid. If the verdict had been for the defendants, would not the court set it aside, as against the weight of evidence? If, on a new trial, there was a verdict for the plaintiff on the rest of the evidence, without the declaration of Browne, would the court set that verdict aside? Is there not enough of evidence to sustain the verdict without that declaration? The court will not grant a new trial where inadmissible evidence is let in, if it were not calculated to influence the minds of the jury, or where the admission or rejection of certain evidence could not change the verdict. *Crease v. Barrett (k)*; *Rutzen v. Farr (l)*.

CRAMPTON, J.—In this case there was a verdict for the plaintiff, subject to certain legal objections taken by the defendants' counsel, upon which they have moved the court to set aside that verdict, and enter a

(i) 2 L. R. N. S. 79.

(k) 1 Cr. M. & R. 919.

(l) 5 Nev. & M. 617.

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verdict for the defendants. It was an action upon a guarantie, whereby the defendants promised the plaintiff that a certain bill of exchange should be paid. The objection is, want of due notice of the dishonor of the bill, and there is confessed *laches* on the part of the plaintiff in that respect; and then the question is, whether there has not been a waiver, on the part of the defendants, of that objection, or evidence of such waiver to go to a jury? I am of opinion that there was evidence to go to the jury, and there is no evidence that Barnett had not notice of the *laches* of the plaintiff, when he made the subsequent promises to have the matter settled without further trouble to the plaintiff. With respect to the objection as to the declaration of Browne which was given in evidence, that declaration was, in my opinion, inadmissible; but I have asked Mr. Justice *Burton* whether he thought that evidence could have had any effect upon the minds of the jury, and it is his decided opinion that it could not. The evidence was, therefore, of no importance; and if the verdict had been the other way, it must have been set aside. Upon these grounds, the verdict must stand; but in consequence of the evidence to which I have referred, I will give no costs on this motion.

Cause shewn allowed, without costs.

## COMMON PLEAS.

*Friday, November 9th.*JUDGMENT ON PARLIAMENTARY APPEARANCE SET  
ASIDE.

HERON v. ———

Mr. FITZGIBBON applied on a former day in this term, to set aside the judgment and parliamentary appearance in this case ; there being no affidavit of merits on the part of the defendant on that day, the court made no rule on the motion, with liberty to the defendant to serve a new notice.

On this day, the application was re-moved on behalf of the defendant, to set aside the parliamentary appearance and judgment marked thereon, on terms of paying all the costs after appearance and judgment, offering to plead to the declaration forthwith, and to take a short notice of trial if necessary. This was an action of covenant on a lease for subletting ; the defendant had sworn to merits, and offered to the plaintiff all the usual terms in such cases.

There is a substantial question to be tried between the parties ; it is the consideration of a covenant contained in the lease.

The court will set aside a judgment obtained on parliamentary appearance when there is a substantial question to be had between the parties altho' no irregularity was alleged in the marking of the judgment or to entering the parliamentary appearance.

Mr. *Hatchell*, Q. C., for the plaintiff.—In this case there are two questions. First whether there be sufficient affidavit of merits on the part of the defendant, and if so, whether he shall be let in to plead to the declaration, and on what terms. The subletting, which the plaintiff says is a breach of the covenant contained in the lease to the defendant, is of a very annoying and injurious nature, the building of small hovels close to the entrance gate of the plaintiff's house. The plaintiff never assented to the subletting of the land. The declaration was in January. The judgment was not marked till the May following. Here there is no complaint of irregularity in the proceeding. It is a favor to let the defendant in. We have a right to have the judgment as a security. This, and the terms which they have offered, are the only ones on which the court will permit a defendant to come in.

Mr. *Fitzgibbon*.—We offered you every thing by our notice to which you were entitled.

CHIEF JUSTICE.—In this case, we have no doubt that there is a substantial question to be tried, and therefore that we ought to grant the motion on the terms offered by the defendant in his notice, and for that reason we shall give no costs of this motion.

Order granted—no costs.

Saturday, November 24th.

PRACTICE—WRIT—SCIRE FACIAS—SPECIAL DEMURRER.

MORIARTY *Attorney* v. WILSON *Attorney*.

The omission of the words "*quod recuperet*" in a writ of *sci. fa.* to revive a judgment; *Held*—bad on special demurrer.

This was a *scire facias* to revive a judgment, and the writ was in the following form:—

"VICTORIA by the grace of God, &c., greeting—Whereas, Christopher Moriarty, gentleman, one of the attornies, late in the court of our Lord William 4th, late King of the United Kingdom of Great Britain and Ireland, &c., to wit, in Michaelmas Term, in the 7th year of his reign, before John Deherty, Esq., and his brethren, our justices of our Common Bench of that part of our United Kingdom of Great Britain and Ireland, called Ireland, at the King's Courts, by the consideration of the same court, William Wilson, gentleman, one of the attornies as well a certain debt, &c." omitting the usual words "recovered against." Upon the ground of this omission, a special demurrer was taken to the writ.

Mr. Jeffcott, in support of the demurrer.—In this country when no declaration is filed, the writ is to be considered as a declaration, and any objection which would be fatal to a declaration, must be fatal to a writ. If the declaration has a blank for a day or place, or other material thing, whereby it is insensible, it will be bad. *Com. Dig. Tit. Pleader C. 23*. So also, in an action of trespass, "*quare clausum fregit*," the declaration omitted "*fregit*," upon which ground the judgment was arrested. *Ellis v. Yates* (a). The necessary and established words for the entry of a judgment for the plaintiff are, "*Idio consideratum est per curiam quod que reus recuperet*," and so jealous were the courts in allowing any alteration in this, the established form of entry, that the judgment has been reversed, because entered, "*Idio concessum est &c.*" *Robins v. Sanders* (b). *Slocomb's case* (c). A special act of parliament, 16 and 17 C. 2, c. 1, was passed to prevent the reversal of judgments upon this ground. Where a judgment was had upon a *sci. fa.*, and it appeared that the judgment upon which it issued was erroneously entered, the judgment on the *sci. fa.* was reversed. *Damport v. Thatcher* (d). The "*quod recuperet*" is as material a part of the entry as the "*idio consideratum est*," and on this ground the defendant is entitled to judgment.

Mr. Thomas Kennedy, contra, relied principally upon the error being the act of the officer of the court.

*Per Curiam*.—We will allow the demurrer but give the plaintiff leave to amend. Demurrer allowed.

(a) 2 Vent. 153.  
(c) Cr. Care. 442.

(b) 1 Cr. 386.  
(d) Cr. Eliz. 145.

## EXCHEQUER OF PLEAS.

*Tuesday, November 6th, and Wednesday, November 7th.*

## TROVER—SHIP—TENANTS IN COMMON.

KNIGHT *v.* COATES and another.

Action of trover brought to recover the 8-64th parts or shares of a certain vessel.

The case was tried before PERRIN J., at the Spring Assizes for Cork, 1838, when the following facts appeared in evidence:—

The plaintiff and defendants were respectively possessed of certain shares in a vessel called the *Triumph*, which was the property of several part-owners.

The defendant Coates and his partner, one Osborne, had been duly appointed, with the consent of the owners, ship's husbands, in which capacity, they continued to act from the time the vessel was launched, in January, 1832, until it was lost in 1836.

In 1834, Osborne and Coates, acting as ship's husbands, removed one Butler from the command of the vessel, and appointed one Trevis captain in his place. In the month of December, 1835, the *Triumph* arrived in the port of Cork with a cargo, under the command of Trevis, who, instead of taking the vessel to Osborne and Coates, took it to a ship-broker of the name of Barry.

It appeared that Trevis acted, on this occasion, in pursuance of directions contained in a certain letter or instrument, bearing date the 7th of December, 1835, and signed by the owners of the vessel, who were possessed of the majority of shares. This document, and another of the same date, signed by the same parties, and purporting to be an appointment of another person to the office of ship's husband, in the place of Osborne and Coates, were produced and proved.

On the 15th December, 1835, Osborne and Coates dismissed Trevis, and appointed one Pearse, captain; they also took charge of the vessel and cargo, alleging that no admiralty warrant had been procured to supersede them as ship's husbands.

It further appeared, that the plaintiff and one Hickson, (another part-owner,) having subsequently gone on board to remonstrate on the removal of Trevis, and to insist on his restoration to the command, were forcibly turned out of the vessel and put on shore by the orders of Osborne, and the defendants; and that after discharging the cargo, Osborne

A vessel belonging to a number of part-owners was forcibly taken by the minority out of the possession of the majority, and sent by the former upon foreign voyages on one of which it was ultimately lost:—

*Held*, that trover could not be maintained.

One tenant in common of a chattel cannot maintain trover for it against his co-tenant while the right of recaption remains; but when that right has been put an end to by the act of the co-tenant, an action of trover lies.



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and Coates sent the *Triumph* to sea, having placed on board several additional men, to resist any attempt that might be made on the part of the plaintiffs or Trevis to re-take the vessel.

The plaintiff, on the 12th of December, being the day after that on which the *Triumph* had sailed, served a notice upon Osborne and Coates, requiring them to inform him where the vessel had proceeded, and to give an account of its state and condition, that he might be enabled to effect an insurance on it.

On the same day, Osborne and Coates served a notice in reply, giving the plaintiff the information he required.

The vessel continued to trade in foreign parts, under the command of Pearse, from December, 1835, until the 6th of December, 1836, when it was lost in a gale of wind, while proceeding with a cargo from Newfoundland to Alicant.

It was admitted that the vessel, when sent to sea, was provided with a sufficient crew, and well found in every respect.

The defendants' counsel called upon the learned Judge for a non-suit, on the ground that the plaintiff and defendants were tenants in common of the vessel, and insisting that as the defendants had not wilfully destroyed it, or misused it in such a way as to lead to its destruction, or appropriated it to their own use, the present action could not be maintained. The plaintiff's counsel relied on the case of *Barnardiston v. Chapman* (a), as expressly in point. The learned Judge refused to non-suit the plaintiff, but reserved leave for the defendants to move the court to have a non-suit entered.

The defendants' counsel then contended that the Judge should leave two questions to the jury.—

1. Did the defendants destroy the vessel ?

2. Did they intend to appropriate it wholly to their own use, or to navigate it for the benefit of the owners? His Lordship declined to do so, and told the jury they ought to find a verdict for the plaintiff if they believed the evidence.

The jury found a verdict for the plaintiff, for £144, being the value of 8-64th parts of the vessel.

Mr. Bennett, Q. C., now moved to make absolute an order *nisi*, which had been obtained to set aside the verdict found for the plaintiff, and enter a non-suit or verdict for the defendants.

The first objection is founded upon the general proposition of law, that one tenant in common of a chattel cannot maintain an action of trover against his co-tenant, because the possession of the one is the possession of the other. *Holliday v. Camell* (b); *Fennings v. Lord Grenville* (c); *Graves v. Sawcer* (d); *Crosse v. Abbott* (e).

(a) 4 East. 127. S. C. Bul. N. P. 34.

(b) 1 T. R. 658.

(c) 1 Taunt. 241.

(d) Sir T. Raym. 15.

(e) Noy's Rep. 14.

There was not such a conversion or destruction of the vessel by the defendants, in this case, as would entitle the plaintiff to maintain an action of trover.

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When the defendants took possession of the vessel, the plaintiff's proper course would have been to apply for an admiralty warrant to detain it. *Abbott on Shipping*, 71, 75; *Holt on Shipping*, 360. *Barnardiston v. Chapman*, by which the learned judge at the trial, conceived the present case was governed, is quite distinguishable from it; there the defendants secreted the ship from the plaintiffs; here, there was no attempt at concealment.

2. At all events the learned Judge should have left the same questions to the jury in this case as C. J. King left to the jury in *Barnardiston v. Chapman*.

Mr. Smith Q. C., and Mr. Collins Q. C., for the plaintiff.—Unless the plaintiff can recover in this form of action, he has no remedy whatsoever. As to the admiralty jurisdiction, it is merely preventive. The minority of the owners can restrain the majority from sending the ship on a voyage, without giving security for the value of the shares of the dissentients; but there is no jurisdiction to grant compensation for the loss of the ship. *Abbot on Shipping*, 70.

Neither has a court of Equity jurisdiction in such a case. *Strelly v. Winson* (f); *Horn v. Gilpin* (g).

And at law, one part-owner cannot recover for fraudulently and deceitfully sending the ship to foreign parts where it was lost. *Graves v. Sawcer* (h).

Therefore, unless this be a forcible taking away of the property, followed by a loss within the authority of *Barnardiston v. Chapman*, plaintiff is without a remedy for what must be admitted to be an act of daring violence. If the whole ship belonged to one owner, and if the defendants, whether as agents or ship's husbands, took it out of his possession and sent it to sea, an action would clearly lie.

The maritime law gives the plaintiff, as the representative of the majority, as absolute a right to the management of the ship, as if it had been his own property. *Molloy*, 203.

As long as the chattel, which is the common property, remains *in esse*, or unchanged, a tenant in common cannot maintain trover against his companion, as he is met by the legal principle, that the possession of one is the possession of the other, and his remedy is, as *Littleton* says, sect. 323, when he can see his time, to take it back again. *Co. Litt.* 200 a; *Brown v. Hedges* (i).

The forcible taking is a clear conversion, but as the remedy is by

(f) 1 Vern. 297.

(g) Ambl. 255.

(h) Sir T. Ram. 15, S. C. 1 Lev. 29.

(i) 1 Salk. 230.

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recaption, no action lies as long as the power of recaption exists: but when the subject-matter is destroyed or changed, the right of action commences. *Co. Litt.* 200, a; *Bac. Ab. Trover*, c. 801; 2 *Saund. Rep. by Wms.* 47, h.; *Barton v. Williams* (k); *Fennings v. Lord Grenville* (l).

If a tenant in common of a house turn his partner out of it, and the house be afterwards burned, an action will lie, for *non constat* that the house would have been burned, had it not been for the expulsion of the co-tenant.

But, independently of other authorities, *Barnardiston v. Chapman* is a decision exactly in point.

Mr. Cooper, Q. C., in reply.—The argument on the other side amounts to this, that if one tenant in common take from the possession of the other, the chattel to which they are entitled in common, even for the purpose of applying it to the use to which it is adapted, and the chattel be subsequently lost by inevitable accident, not caused by the misconduct of the party taking it, trover lies.

What is it that, according to the argument, gives the action of trover? It is not the taking, *Co. Litt.* 200, a; because the possession of the one co-tenant is that of the other; that is, each is entitled to the possession of the chattel; neither has a right, as against the other, to the adverse possession, for each has an equal right to it.

Suppose a vessel, taken against the consent of some of the owners, make a prosperous voyage, and return; or, suppose it sent on a voyage with their consent, and afterwards lost, in neither case would trover lie.

Now, if the taking will not give the right to maintain the action, will the subsequent loss, without the default of the party? It is submitted that it will not, and for this reason, that at the time of the loss, the vessel was in the possession of both, and the party is no more liable to his co-tenant for the loss, than if the vessel were at the moment navigating under the direction of all parties.

Then, what will give the action, or rather an action? for I maintain, that trover cannot be brought by one tenant in common against another, though case for trespass may. The answer is, the *destruction* of the vessel or chattel by one party. *Co. Litt.* 200, a. That will give, not trover, but case or trespass.

In those forms of action, the plaintiff must either aver and prove a wilful destruction of the subject-matter, or such a misuser as led to the destruction of it; but, without one or the other, no action would lie.

It is also said, that the reason why trover cannot be maintained in the case of tenants in common is, that while the thing remains *in esse*, and in the possession of the defendant, it may be said the possession of the one is the possession of the other.

(k) 5 B. & Ald. 43.

(l) 1 Taunt. 249.

That, I admit, is one answer to the action of trover, but it is not the only one, and it by no means follows, that because an action of trover will not lie while the thing is *in esse*, and in the possession of the defendant, an action will lie when the thing is not *in esse*, no matter how it has ceased to exist.

On examination, the test applied by the plaintiff's counsel will not be found to be the true one.

In *Holliday v. Camell* (*m*), it was held that an action would not lie, although the box was no longer in the defendant's possession.

In *Heath v. Hubbard* (*n*), it is doubted whether the sale of a ship by one tenant in common would amount to a conversion, and yet the defendant had there parted with the possession.

The true reason why trover will not lie, by one tenant in common against another, may be found in the principles which govern that form of action. The requisites to maintain it are—

1. That the plaintiff have a right of property.
2. A right to the immediate possession. And,
3. That there be a wrongful conversion by the defendant. *Leigh's N. P.* (*o*).

Although the plaintiff had the first of these requisites, he had not the second, that is, such a right to the property as to enable him to maintain trover. *Gordon v. Harper* (*p*). And even admitting that he had such a right, there was nothing which amounted to a wilful destruction or a profitable conversion by the defendant. *Keyworth v. Hill* (*q*).—[PENNEFATHER, B. Has the plaintiff no remedy?]*—*He has none whatever in any form of action in the present case; and this proceeds from the position in which he has voluntarily placed himself, by becoming a tenant in common with the defendants.

PENNEFATHER, B.

This is an action of trover, brought by the plaintiff, who is the part owner of a certain vessel, against the defendants, who are part owners of the same vessel.

The case may be thus stated:—The plaintiff, who was entitled to eight sixty-fourth parts of the vessel, was in possession of it by a captain of his own nomination, when the defendants, forcibly and against the will of the plaintiff, took the vessel out of his possession.

The vessel was then sent upon a voyage, which, it appears, would have been a fit and proper one, provided all parties had concurred in employing the vessel on it.

It further appears that the vessel was properly manned and equipped,

(*m*) 1 T. R. 652.

(*o*) p. 1476.

(*n*) 4 East. 112.

(*p*) 7 T. R. 9.

(*q*) 3 B. & Al. 685.

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and that, at a considerable distance of time, it was lost by the perils of the sea, without any fault or neglect on the part of the defendants, or those whom they had employed. There were no circumstances which could give rise to the suspicion of their having wilfully destroyed it; and, in fact, no misconduct has been imputed to them in the management of the vessel.

The possession of the plaintiff was sanctioned by the owners who had the majority of shares; and this action has been brought against the defendants, for having taken the vessel out of his possession, and sent it on the voyage, in the course of which it was eventually lost.

The case was tried before Mr. Justice PERRIN, and there having been no controversy about the facts, the learned Judge directed the jury, if they believed the evidence, to find a verdict for the plaintiff.

To this the defendants' counsel objected, insisting that as the plaintiff and defendants were tenants in common, an action of trover could not be maintained; and calling upon the Judge, either to nonsuit the plaintiff, or to leave the case in such a way to the jury, as would authorise them to find a verdict for the defendants.

If the facts were all conceded, and the result (being an inference of law), was to be determined by the Judge—if he were to draw the proper conclusion from those facts, and not the jury—I think he was right in directing them as to the verdict they should find. And as it appears, from the learned Judge's report, that there was no controversy about the facts, the court are of opinion that there was no question to be submitted to the jury. It was purely a question of law, which the Judge took upon himself to decide; and it is our province now to consider, whether that question was rightly decided or not.

It is clear, that if the parties had not stood in the relation of joint tenants, or tenants in common, the plaintiff would have been entitled to maintain trover for the mere taking of the vessel out of his possession, without any subsequent loss or injury. As against a stranger, the taking alone would have been sufficient; but the peculiar situation of these parties, as tenants in common, renders it necessary to consider the rule of law in reference to that relation.

The mere taking of a personal chattel, by one tenant in common, out of the possession of his co-tenant, does not entitle the latter to maintain an action; but if the taking be accompanied or followed by the destruction of the chattel by the tenant in common who takes it, an action can then be maintained.

A distinction has been taken at the bar between trespass and trover, but I think that no such distinction is warranted, either by decided cases, or by any principle of law.

Where the chattel has been destroyed by one tenant in common, an action of trover may be brought against him by the other.

Let us advert to the grounds upon which it has been always held, that one tenant in common cannot maintain an action against his co-tenant, merely for the taking of the chattel, which is the common property. While the thing remains *in specie*, the tenant from whose possession it is taken is not without a remedy. The possession of the one is the possession of the other; and both having an equal right to it, he from whose possession it is taken, may, if he have an opportunity, re-take the chattel; but while it exists *in specie*, no action lies, his only remedy being by *recaption*.

It would, as I conceive, be a strange anomaly in our law, if a case were to be found of an admitted injury without a legal remedy. Before the court would hold, that a tenant in common must submit to what is confessedly a wrong, without having the means of obtaining redress, it would pause and consider whether it was coerced by the authorities to arrive at such a conclusion. But no such anomaly will be found to exist; tenants in common are not without their remedy; that remedy being sometimes by action at law, and sometimes by recaption, or the act of the party.

The exception mentioned in *Co. Litt.* 200, *a*, is where the chattel has been *destroyed*. If we examine the meaning of that phrase, we shall find that it does not imply that the thing should be *actually* destroyed—by burning, for instance, or by some other means whereby an actual loss may be occasioned—but a destruction, within the meaning of that phrase, takes place, as I apprehend, whenever the plaintiff's right of recaption has been entirely put an end to by the act of the defendant. And it has accordingly been held, that if a tenant in common disposes of the chattel in market overt, an action may be maintained by his co-tenant, although in that case the thing has not been actually destroyed; because, as to the plaintiff, his right of recaption is gone. That remedy being destroyed by the act of his co-tenant, the party is remitted to the rights of any other person, and may obtain redress by action.

That explains one of the grounds on which it has been said, that an action cannot be maintained by one tenant in common against another. It is consequently a mistake to say, that there is an injury without a remedy. Whilst the thing continues *in specie*, the remedy is by recaption; but when it no longer exists, the remedy is by action.

Having thus shewn, as I conceive, the reason why one tenant in common cannot in general maintain an action against another—having also shewn what exceptions there are to that rule, by the destruction of the chattel held in common, and having explained the meaning of the word destruction, let us now see how far the present case is to be considered as governed by the case in 4 *East* (r). It is said, by the defendants' counsel, that trover does not lie for the mere taking, and that if the

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vessel had returned after a prosperous voyage, the action could not be maintained. Unquestionably it could not; for whilst the vessel remained *in specie*, to be come at as any ordinary chattel, the objection against one tenant in common maintaining an action against another would have remained in full force. It is also said, that if the vessel had been sent on the voyage with the assent of the plaintiff, no action could have been maintained; that is equally true, for *volenti non fit injuria*.

Although neither the taking nor the destruction of the vessel would separately be sufficient to entitle the plaintiff to maintain the action, yet when taken together, they completely make out his case.

It is impossible to distinguish the case of *Barnardiston v. Chapman* from the present, and we cannot, therefore, decide for the defendants without directly overruling it. The defendants' counsel, in that case, contended, that one tenant in common was only answerable to the other tenant in common for an actual destruction; but Chief Justice King left it to the jury, upon the whole circumstances of the case, "Whether, by the defendants' force, the ship was actually taken from the plaintiff, and secreted, and carried out of his power, to preserve the ship? and a destruction happening in those circumstances, whether it should be found to be a destruction by the defendants' means?" which the jury accordingly found; and upon a motion for a new trial, the court were unanimously of opinion that the Chief Justice's direction was right. Although the Chief Justice's charge is put in the form of a question, left to the jury, yet, from the context, I think it must be taken as a direction to them.

That case shews, that if a vessel be forcibly taken by one tenant in common out of the possession of the other, although trover cannot be maintained for the mere taking, yet if the vessel be afterwards lost, whereby the plaintiff's remedy by recaption is gone, the action can be sustained; for the loss of the vessel is to be attributed to the act of the party who wrongfully took possession of it. As I have already observed, an absolute destruction of the thing held in common is not necessary to maintain the action, as instanced in the sale of an ordinary chattel in market overt by one tenant in common, which has been held to constitute a conversion; but here, an absolute destruction has taken place, and, in my opinion, it must be considered as a destruction by the defendants, who took the vessel out of the possession of those who had the legal custody of it; and whether the defendants managed the vessel well or ill, they must be answerable for the original taking, which in itself was wrongful.

If necessary, we might rest our decision upon the authority of the case referred to; but we are not driven to say that in 1714, for the first time, the reproach was taken away from the law, of admitting a fla-

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grant injury to exist without furnishing the means of redress. It is said upon the authority of *Gordon v. Harper* (s), that trover will only lie where there is a present right to the possession; but here the plaintiff had a present right to the possession, and as that right was invaded by the defendants, they must now be answerable for the consequences.

I therefore think the course taken by the learned Judge at the trial was the proper one.

FOSTER B. I agree in thinking that the course taken by the learned Judge at the trial ought to be upheld, as we must otherwise overrule the case of *Barnardiston v. Chapman*. Were it not, however, for the authority of that case, the arguments of the defendants' counsel must, in my opinion, have prevailed. But the two cases are exactly parallel. The question in the former was, whether an action of trover could be maintained? and, fortunately for the ends of justice and good sense, C. J. King found no difficulty in coming to the conclusion that it could.

If it were not for the authority of that case, I confess, I should in vain have looked for an authority in any of the earlier decisions.

Mr. Cooper has pressed his argument with great ingenuity and fairness. When (he asks) did the conversion take place? Was it in the original taking however forcible? Certainly not. Was it in sending the vessel on the voyage?

It is conceded that it was not.

Or lastly, was there any conversion in the subsequent loss or detention of the vessel?

Under the circumstances, I should be inclined to say there was not. Speaking generally, I would say that in a case, where the chattel was used by the person who takes it in a manner not *secundum subjectam materiam*, it would amount to a conversion. But what was the case here? The vessel was sent on a legitimate and suitable voyage, and its loss was occasioned not by the fault of the defendants, or through the want of human foresight, but by misfortune and the fury of the elements.

Now, to hold that the loss of a vessel, occurring under such circumstances, amounts to a conversion by the persons who in the original taking were guilty of no conversion at all is a proposition at which in the abstract, I never could have arrived.

But we have a well considered decision by which such a proposition has been established; and the question now is, are we by overruling that decision, made upwards of a century ago, to involve ourselves in the technical difficulties which have been so fully adverted to? I think we ought not to do so; and am therefore of opinion that the learned



Judge at the trial, finding the case of *Barnardiston v. Chapman*, so exactly in point, was right in directing the jury to find for the plaintiff, if they believed the evidence.\*

\* The Chief Baron and Richards, Baron, were absent.

*Tuesday, November 6th.*

**PRACTICE—AFFIDAVIT TO HOLD TO BAIL ON A  
BILL OF EXCHANGE.**

**TUTHILL v. BRIDGEMAN.**

An affidavit to hold to bail in an action by the indorsee against the acceptor of a bill of exchange must state the indorsement to the plaintiff.

The affidavit to hold to bail, which was made by the plaintiff, stated that H. O. Bridgeman (the defendant) stood justly indebted to the deponent in a certain sum, besides interest and costs of protest, "due by Mary Lurey's draft on H. O. Bridgeman; acceptance payable in sixty-one days after date, and which bears date the 20th day of February, 1837."

After stating another acceptance of the defendant in similar terms, the affidavit concluded with an averment, that a certain sum forming the gross amount of both bills, besides interest and costs of protest, remained due to the deponent by the defendant, over and above all just and fair allowances.

Mr. *Freeman* applied to the court to have the defendant discharged out of custody on filing common bail, and contended that the affidavit was defective, as it neither stated that the bills were endorsed to the plaintiff nor showed plaintiff's relation to them.

No one appeared to shew cause of bail.

The Court considered the affidavit insufficient, and made an order to  
Discharge the defendant.

## QUEEN'S BENCH.

*Monday, November 19th.*

### PROHIBITION—COURT OF CONSCIENCE—MARRIAGE.

COGHLAN v. BOLAND.

A rule *nisi* was obtained on the 22d of September, for a prohibition to prevent Alderman William Hodges, the President of the Court of Conscience, from proceeding in a cause in which Boland was plaintiff, and Coghlan defendant. The suggestion set forth, that the Court of Conscience had been held, from time immemorial, in the city of Dublin, before the Lord Mayor of the said city for the time being, with the assistance of the Aldermen, &c., for determining causes of debt between party and party, under the value of 40s., late Irish currency; and that by the 33 G. 2, c. 16, it was ordered, that from thenceforth the Lord Mayor should be exonerated from attending upon the said Court of Conscience during the year in which he should serve the office of Lord Mayor, and that the person who should have served in said office for the next preceding year should preside in the said Court of Conscience, for the space of one year next after he should have served in the office of Lord Mayor. It then averred that the said court had, since the making of the said statute, been held before, and presided over by the person who had served the office of Lord Mayor of the said city, for the year next preceding his presidency of said Court of Conscience, and that all manner of pleas and questions touching the validity of marriages or matrimonial contracts between party and party have not, nor ever have been, nor ought to be, within the jurisdiction of the said court of Conscience, but that the same should be tried and determined by the laws and courts Ecclesiastical and Spiritual of the land to which said courts, such pleas, questions, &c., and the cognizance thereof, specially belong; nevertheless, that one Margaret Boland, of Grafton-street, &c. not being ignorant of the premises, but designing unduly to aggrieve the said Coghlan, contrary to the laws of Ireland, and to draw the cognizance of plea, which specially belongs to the Courts Ecclesiastical of this realm, to another determination in the said Court of Conscience, before one Alderman William Hodges, President of the said court, levied and affirmed her certain complaint against the said Coghlan, averring that the said Coghlan owed to her the sum of 30s., of, &c., and claimed the said sum of 30s. to be payable to her by the said Coghlan, because the said Coghlan, before and at the time of levying her said

A prohibition does not lie to the President of the Court of Conscience, to restrain him from proceeding in an action of debt, in which the question of marriage arises incidentally.

*Sed semble*, if it appear that the action was only *colorably* for debt, but really to try the validity of the marriage, a prohibition will be issued.

The rejection of a plea to the jurisdiction of an inferior court, is not a ground for a prohibition, unless it appear that the plea was verified by affidavit.

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complaint, was indebted to her for the maintenance and lodging of Amelia Boland, who, the said Boland alleged, was the wife of the said Coghlan. The suggestion then averred the fact of the summons, the appearance of the present plaintiff in the court below, for the purpose of pleading to the jurisdiction, the plea, and its rejection by the President, who entertained the case, and gave judgment against the present plaintiff, for the debt alleged to be due by him to M. Boland, the sister of the person declaring and averring that she was the wife of the present plaintiff, and then denied the legality and validity of the alleged marriage, and concluded with the usual prayer for a writ of prohibition, &c.

The suggestion was verified by an affidavit, stating the same facts as those disclosed in the suggestion.

The defendant put in an answering affidavit, admitting nearly all the facts stated in the suggestion, and affidavit of the plaintiff, but denying that the Court of Conscience wanted jurisdiction over the cases mentioned in the plaintiff's suggestion, and averring that her sister was the lawful wife of the plaintiff, and that, as such, he had a right to support and clothe her, but that not having done so, but having turned her away and abandoned her, she took her home and maintained and clothed her, and that the plaintiff was lawfully indebted to her in the sum of, &c.

Mr. *F. Macdonagh* now shewed cause.—If a prohibition be granted in this case, it must be done on some of the allegations contained in the suggestion. *Smart v. Wolfe* (a). On the face of this suggestion nothing appears which enables the court to say that a prohibition ought to issue. The plaintiff does not deny he is married to Amelia Boland; he only swears that he is advised and believes that he is not legally and lawfully married to her; but if a ceremony of marriage took place, and he has lived with and treated her as his wife, and has held her out to the public as such, this is quite sufficient to make him liable for her support. But it is averred in the suggestion, that the plaintiff pleaded to the jurisdiction of the court below. This goes for nothing, as he did not verify, nor attempt to verify his plea, by affidavit at the time he objected to the competency of the court below. *Burdett v. Bewell* (b). With respect to the competency of the court below to entertain this suit, its jurisdiction is regulated by the 33 G. 2, c. 16, s. 15, and it extends "to causes between party and party, under the value of 40s." The present is a suit for 30s.; it is an action of debt triable at common law, and the course of proceeding in the Court of Conscience is the same as at common law. It is clearly a question of debt, and the question of marriage arises only incidentally in the cause. The Ecclesiastical Courts

(a) 3 T. R. 244,

(b) 2 Ray. 1211.

have, therefore, no right to interfere in matters of this kind ; the liability of a man for the debts of his wife is every day tried here, and in every court of record in the country. Mr. *Macdonagh* was proceeding to argue the question, when he was stopped by CRAMPTON, J., who called upon

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Mr. *John Walsh*, in support of the rule.—The writ of prohibition must go on three grounds : First, the rejection by the court below, of the plea to the jurisdiction of that court. Second, the entering on, and determining the validity and legality of an alleged ceremony of marriage which properly and of right belongs to the Court Christian, or which, at least, cannot be inquired into and determined by a court of such peculiar and limited jurisdiction as the Court of Conscience. Third, the arbitrary arrangement by the plaintiff, of the amount for which she would bring her action ; commencing suit when the sum claimed was within the jurisdiction, viz.—30s., thus, evidently *splitting* the cause of action, to give the Court of Conscience jurisdiction. As to the first ground, the defendant pleaded in the court below, that this was question for a Court Christian ; that it was in a matter matrimonial, the validity of which was contested ; the court below rejected that plea, and proceeded to judgment, which is good ground for prohibition. *Chave v. Calmel* (a). The rules of proceeding in the Court of Conscience, are not the same as in the Common-law Courts ; in the former, both plaintiff and defendant are sworn, and there is a charge of five pence for every oath administered to a witness, without which fee the testimony will not be received ; the argument from the practice of the Common Law Courts does not therefore apply ; and the rejection of the plea entitles the defendant to a writ of prohibition. Even if the proceedings in the Court of Conscience were similar to those in the Courts of Common Law, the rejection of the plea would be a matter of appeal. There is no appeal from the decisions of the President of the Court of Conscience, and as no appeal lies, prohibition clearly lies. *Chave v. Calmel*. By the plaintiff's affidavit it is admitted that the plea was rejected, but it is not shewn in their affidavit how our plea was bad or defective, and this is also ground for prohibition. *Darby v. Cosens* (b). As to the second ground, the Court of Conscience is for determining "causes between party and party," under 40s., late Irish currency. This customary jurisdiction is confirmed by the 33 G. 2. ; the 17th sec. shows the plaint must be levied for debt only, by the President of that court. But here the plaint is levied *colorably* for debt, but really, and in fact, to try the legality of an alleged ceremony of marriage, the validity of which is disputed, and upon this ground the plaintiff is clearly entitled to a prohibition, to enable him to try the validity of that alleged cere-

(a) 3 Bur. 1873.

(b) 1 T. R. 556.

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mony in the Court Christian. The Court of Conscience has not concurrent jurisdiction with the Queen's Courts of Record: and its jurisdiction being summary, its powers exercised by persons arbitrarily appointed without any regard to legal qualification, and without the intervention of a jury, it should be regarded jealously, and kept strictly within its proper limits. So early as the reign *Henry 3*, we find a prohibition mentioned by *Harris*, in his "Collection of Manuscripts," vol. 1, which issued in the 50th year of that King, to the citizens of Dublin, (that is, to the corporation,) to restrain them from meddling in matters matrimonial or testamentary: and the London and Bath Courts of Conscience acts, as well as most of the other acts for such courts, contain this prohibitory clause, "That the jurisdiction of the court shall not extend to any debt for rent, upon lease of lands, or tenements, or any other real contracts, nor to any other debt that shall arise by reason of any cause concerning a testament or matrimony, or any thing concerning or properly belonging to the Ecclesiastical Court, though the same be under 40s." 3 *Jac.* 1, c. 15, s. 6; also, the 22, c. 47, s. 16. In the same reign, in which the latter act was passed, the declaratory act concerning the Dublin Court of Conscience was also passed, which certainly shews that, at that period, the legislative mind was against allowing Courts of Conscience to meddle in causes of debt, even under 40s., when they arose out of, or were concerning matrimony; which is the very case now before the court. The reason of the omission of a similar prohibitory clause in the Dublin Court of Conscience may have been, that as the act was merely declaratory of the customary jurisdiction, and that suits of this kind were not then entertained by this court, it was not necessary expressly to exclude them. Upon the third ground, the authorities are quite conclusive. *Cairnes v. Whelan* (a); *Girling v. Alders* (b), and *Bacon's Abrd. Prohibition, K*.

CRAMPTON J. This is an application to the court to issue a prohibition in order to restrain the President of the Court of Conscience from proceeding in a cause in which Margaret Boland was plaintiff, and David Coghlan defendant, in the court below. If the suggestion disclosed the same state of facts as the statement of Mr. *Walsh*, I will not say but this court would issue a prohibition, but there is not sufficient on the face of the suggestion to warrant this court in doing so in the present case. The clauses in the English Courts of Conscience acts speak for themselves; they clearly take away the jurisdiction of the English Courts of Conscience, in cases similar to the one now before the court; but there is no such prohibitory clause in the 33 *G.* 2nd, c. 16, which declares and confirms the jurisdiction of the Dublin Court of Conscience.

(a) 1 *Hud. & Br.* 552.

(b) 1 *Vent.* 72.

As to the rejection of the plea in the court below, it cannot be ground here for a prohibition, unless that plea was founded in truth, for if the Court of Conscience were to be ousted of their jurisdiction by such a plea, the court might soon close up its doors. In the Common Law Courts, on an action of debt, for necessities furnished to a man's wife, a question frequently arises as to the extent of his liability, or as to his liability at all, by reason of certain circumstances connected with the marriage, and sometimes in consequence of the marriage itself; yet the court always entertains and decides these questions; and I can see no reason why the Court of Conscience may not do the same, within the limit of their jurisdiction. However, I must say, that it would be more discreet and judicious for the President of that court, when questions of so serious a nature would be brought before him, to decline entertaining them or giving any judgment on them, but leave them to a higher tribunal. One point urged by Mr. *Walsh* has struck me very forcibly, it is this—that the action in the court below was only *colorably* for debt, but really to get a legal decision on the validity of an alleged marriage ceremony. If that fact was set forth sufficiently clear on the face of the suggestion, I would feel bound to grant the prohibition, as this court would never permit such a court to try the question whether an alleged ceremony was a legal and binding marriage, or the contrary. As to the 3d point, the suggestion does not disclose a case of *splitting* of the cause of action, neither does the case of *Cairnes v. Whelan* apply here. There the coal-metre ceased in the midst of his duty, and attempted to sever into separate causes of action that which was one continuous and undivided cause of action, if any he had; here each week may have brought a new and distinct cause of action, the same as weekly rent. Taking the entire facts as they appear on the suggestion, I am of opinion that there is not sufficient disclosed to call for the interference of this court.

Allow the cause shewn, but without costs.

Tuesday, November 20th, 1838.

PORTRIEVE OF, A TOWN, ACTION AGAINST—MONTH'S  
NOTICE—JUSTICES OF THE PEACE.

KELLY v. COLLIS.

TRESPASS for false imprisonment: the defendant pleaded the general issue. Upon the trial of the cause before CRAMPTON J. at the sittings

before action brought under 43 G. 3. c. 148, s. 1, not being included in the words "justices of the peace, or governor or deputy governor of any county or place in Ireland."

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A portrieve of a town is not entitled to a month's notice

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after last Trinity term, it appeared that the defendant was portrieve of the town of Swords, and as such, was, on the day on which the trespass was alleged to have been committed, visiting the shops of the bakers, and examining the bread, and in one of those shops met the plaintiff, who entered into some altercation with the defendant, who then arrested him, and had him imprisoned for a short time. For this imprisonment the action was brought, and at the trial, the defendant's counsel submitted that the plaintiff should be non-suited, as the defendant was entitled to a month's notice before action, brought under 43 G. 3, c. 143, s. 1, and no such notice had been proved to have been given. The learned Judge reserved the point, subject whereto the jury found a verdict for the plaintiff, with £20 damages. A rule *nisi* had been obtained on a former day to set aside this verdict, and enter a non-suit, against which

Mr. *Hatchell*, Q.C. with whom was Mr. *M'Keon*, now shewed cause.—Unless a portrieve is included in the words used in the statute, to denominate the persons entitled to the month's notice, there is no ground to sustain the order. The act which gives this privilege is the 43 G. 3, c. 143—and the words used to denominate the persons who are to enjoy it are, “justices of the peace, or governor, or deputy “governor of any county or place in Ireland.” The portrieve of a town cannot be included in these words.

Mr. *Napier*, *contra*. It is conceded in evidence that the defendant was acting in the discharge of his duty as portrieve. A portrieve is a governor of a town, and therefore within the words of the statute. *Cowen's Interpreter*, tit. *portrieve*; *Terms de la lay*, 597. The 10 c. 1, sess. 2, c. 16, which required, that in any action against justices of the peace, &c. for any thing done in the execution of their office, the venue should be laid in their own county, and also permitted them to plead the general issue, and give special matter in evidence, expressly included portrieves, which shows that the legislature intended the same protection to both these public officers. The 43 G. 3. c. 143 does not specify the several classes mentioned in the 10 c. 1. but the policy of the two acts is the same, and the former uses the general word “governor” of any county or *place*; now I have shewn the word portrieve has been held to mean governor, and the word *place* must refer to localities similar to that in the present case. The defendant was also entitled to notice, inasmuch as he claimed a right to act as a justice of the peace, and *bond fide* believed he was acting as a justice of the peace, although that right was disputed. *Jones v. Williams* (a);

(a) 1 C. & P. 459; S. C. 5 D. & Ry. 654, & 3 B. & C. 762.

*Wedge v. Berkeley (a)*. The question of *bona fides* or *mala fides* should be left to the jury, which was not done.

Mr. *M'Keon* replied.

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*Per Curiam.* The question in this case turns upon the meaning of the terms used in the 43 G. 3, c. 143, which have been mentioned. The 10 c. 1, sess. 2, c. 16, was also cited, but it can have no application to this case, beyond shewing that portrieves may have been in the contemplation of the legislature when it passed the subsequent act. It is clear, the defendant does not come within the words "justices of the peace;" if he was so by commission or by charter, it was not produced. It has been contended that, as portrieve, he is governor of the town of Swords, and thus within the act; and so the word portrieve is explained in *Terms de la lay*; but the question is, whether, although he be thus governor of a town, he belongs to the class of officers meant by the word governor, or deputy governor, as used by the legislature in the 43 G. 3. There is no better rule on this subject than *noscitur a sociis*; it is here coupled with justice of the peace; and on looking to the statute law of Ireland, I find a very large class of persons designated as governors and deputy governors of counties, and counties of cities and counties of towns, being counties in themselves, to whom I am of opinion the legislature intended to refer. These officers have been replaced by the appointment of lieutenants of counties, and all their powers are now vested in the latter officers, under 1 & 2 W. 4, c. 17. There are still, however, governors of limited jurisdictions not affected by this act. As to the word *place*, it occurs frequently throughout the militia acts in connection with governor and deputy governor, and seems to have been used for brevity, and to avoid the repetition of governor of counties and counties of cities, &c. Upon the whole, the verdict must stand, but as the defendant is a public officer I will give no costs.

Rule discharged without costs.

(a) 1 Nev. & P. 665.



*Tuesday, November 20th.*

**PRACTICE—CONDITIONAL ORDERS—MANDAMUS—  
ASSESSMENTS—CHURCHWARDENS.**

The QUEEN *v.* the Minister and Churchwardens of the parish of Saint Catherine, City Liberty.

Also,

Same *v.* the Minister and Churchwardens of the Parish of Saint Catherine, Thomas-court.

Where conditional orders had been obtained for two writs of *mandamus*, to compel the Minister and Churchwardens of two parishes in the city of Dublin to applot upon the inhabitants under 33 G 3, c. 56, and it appeared that these two parishes were united into one by act of parliament, the court refused to make them absolute, although it had been the immemorial usage to applot in that way.

Mr. HENRY WEST obtained a rule *nisi* in Trinity Term, for a writ of *mandamus* to issue to the defendants in the first case, directing them to convene a vestry of the inhabitants of the parish of St. Catherine, city Liberty, to applot and assess upon the several solvent inhabitants the sum of £371. 6s. 7d., being the amount remaining unapplotted and unassessed of the several sums of £454. 11s. 8d., and £463. 5s., which sum of £454. 11s. 8d. was the proportion applotted upon, and to be borne by, the said parish, of the sum of £18,070. 14s. 9d. presented for at Easter Term by the City Grand Jury; and of the sum of £3,064. 18s. 5d., presented by the Quarter Sessions Grand Jury, at Michaelmas Sessions, 1837, and January Sessions, 1838; and which said sum of £463. 5s. is the arrear of former presentments. Mr. West also obtained a similar rule in the second case; against which

Mr. Smith, Q. C., now shewed cause.—These conditional orders cannot be sustained; they are taken against two parts of the same parish, as if these parts were separate and distinct parishes. There may have been some immemorial division of this kind; but, by the 6 *Anne*, c. 21, the boundaries of several parishes were regulated and defined, and by the 13th and 14th sections, the precise boundaries of Saint Catherine's parish are described, and the two districts specified in these orders form a part of the parish of St. Catherine, as therein defined. This being so, the Churchwardens consider the proceedings illegal, in making separate applotments and assessments upon these districts. It might as well be contended, that in Peter's parish a distinct applotment and assessment could be made upon Stephen's-green, and thus the burden of the entire parish be thrown upon a particular part of it. The 33 G. 3, c. 56 prescribes the mode in which the money is to be raised. By the 2nd sec. of that act, the grand jury are required to take an exact account of the minister's money chargeable upon the *several* inhabitants of this city, in their *several* parishes, and from thence to form a table of applotment; by the 3d sec. the treasurer is to give notice to the minister and churchwardens of their *respective* parishes, to return an account of the gross sum of minister's money payable by the inhabitants of each and every

such parish; by the 4th *sec.* the treasurer is to applot and assess on the *several* parishes in said city, and insert same in warrants to be signed by the Lord Mayor: every section pointing expressly to the *several* inhabitants of each parish, and to the *several* parishes in the city. There are no such parishes in the city as those named in the order, and consequently the warrants directed to the churchwardens in the present instance are illegal. The same observations apply to the arrears, which, if assessed under illegal warrants, the churchwardens would not be justified in levying. The conditional order is taken wrongly, and cannot be sustained. *Rex v. Rippon (a)*; *Rex v. Mayor of Abingdon (b)*.

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 OF, &c.

Mr. Sergeant *Greene*, with whom was Mr. *H. West*, in support of the conditional orders.—This is the first time that objection has been taken to a proceeding which was founded upon immemorial usage. The conditional orders have been taken in the terms in which the grand jury made the presentment, and which means no more than this, that so much of the parish of Saint Catherine as is comprised in the ancient name of Saint Catherine City Liberty shall pay so much, and so much of same parish as is comprised in the other denomination so much more. If the effect of this was to throw an undue burden upon any part of the parish, the proceeding would be irregular, but such is not the case. By the 3d *sec.* of the 33d *G. 3*, c. 56, the churchwardens return the gross amount of minister's money paid by their several parishes, and according to that return the proportion which such parish is to contribute to the general expenditure is determined, and afterwards the churchwardens determine how much each solvent inhabitant of their respective parishes is to contribute to make up this sum, by the amount of minister's money he pays. No injustice can therefore be done to any one. They are the churchwardens of the entire parish, and the *mandamus* is to direct them to assess so much upon one part, and so much upon the other.—[CRAMPTON J. If I give you the writ it will be a mere *brutum fulmen*, for it will be directed to the churchwardens of a parish which does not exist.]—The objection is merely technical; the orders are in the terms of the warrants; they follow the presentments, and there never can be an assessment unless in this form. It has been the usage to applot and assess in this form, and that immemorial usage is expressly recognised in the 33 *G. 3*, c. 56. Is it now to be upheld? or is this parish to screen itself from its share of the general expenditure of the city upon what is, at best, a mere technical objection? The learned Sergeant was proceeding to support his views, but yielded to the opinion of the court, that the conditional orders could not be sustained in their present form.

Cause allowed, without costs.

(a) 1 Ray. 563, S. C. 2. Salk. 433.

(b) 1 Ray. 559.

Wednesday, November 21st.

PRACTICE—SECURITY FOR COSTS—EJECTMENT.

Lessee of FLYNN v. The Casual Ejector.

Atenant will be required to give security for costs under 1 G. 4, c. 87, although there are *laches* on the part of the landlord in the service of the notice required by the statute, if there be no affidavit on the part of the tenant shewing that there is something to be tried.

A rule *nisi* had been obtained on a former day, requiring D., J. and Edward Maher, three of the tenants of the lands for which an ejectment had been brought, to give security for costs, pursuant to the provisions of the 1 G. 4, c. 87. It appeared that those persons derived under the original lessee of a lease, dated 1804, whereby the lands were demised for a term of thirty-one years, from the 1st May, 1807. The notice required by the statute was served upon the 13th of October, 1838. The affidavit of service of the notice stated, that the deponent served the notice upon D. Maher, and at the same time, demanded the possession from him, and then went on to state a similar notice and demand from each of the others. It did not appear whether or not they held as joint tenants.

Mr. Fogarty, Q. C., shewed cause.—The decisions as to the period at which the notice should be served have been, until lately, very conflicting, and although the Exchequer seemed to yield, in the recent case of *Lessee of Lord Bandon v. The casual Ejector* (a), to the opinion of this court, that it may be served after the expiration of the term; the court held also, in that case, that this application was one entirely to the discretion of the court, upon a consideration of all the circumstances, and refused the application, upon the grounds of *laches* in the plaintiff, in lying by for such a length of time after the expiration of the term. In the present case, there have been as great *laches* on the part of the landlord. The tenancy expired on the 1st of May, and the notice was not served until the 13th of October, and during all that time, the tenants had not received the slightest intimation that they were not to continue in possession, and be considered as the tenants of the lands, until they were served with the notice, and the possession demanded from them at the same moment. The notice should precede the demand, and it would be most unreasonable to require the tenants to quit the very instant this notice is served, especially where it does not immediately follow the expiration of the demise; and where this act contains most penal enactments against the tenant, it should not receive that construction. The service and demand of possession are bad upon another ground. Where three are in possession, under the same demise, service should be made upon all, before a demand of possession was made

(a) 6 L. R. N. S. 315

from either, which was not done in this case. As to the interval of time which should elapse between the service of the notice and the demand of possession, that is a matter entirely in the discretion of the court.

Mr. *Berwick*, in support of the rule.—There is no affidavit in this case to shew the circumstances upon which the court should exercise its discretion. In *Lessee of Lord Bandon v. Ejector*, there were affidavits shewing the *laches* of the landlord, and swearing to merits. Mr. *Berwick* was stopped by

CRAMPTON, J., who said, if there was an affidavit shewing that there was something to try, it would alter the case, but in the absence of such an affidavit, I must make the

Rule absolute, with costs.

Wednesday, November 21st.

#### NEW TRIAL—FORM OF ACTION—TOLLS.

MINHEAR v. O'LEARY.

ASSUMPSIT.—This was an action brought by the plaintiff, as the clerk of the trustees named in the 52 *G. 3*, c. 138, for maintaining the road between Cork and Tralee, for £172, being the rent or sum agreed to be paid for the tolls of a certain gate erected on the said road. The declaration contained three counts; the two first, were special counts upon an agreement; whereby the said trustees, on the 22d July, 1837, agreed to demise to the defendant the tolls of the said gate, for the term of one year, from the 1st of August, 1837, and at the rent of £172 a-year; and the third count was for the use and occupation of the said tolls. The defendant pleaded the general issue. The case was tried at the last Summer Assizes, before *Richard Moore*, Q. C., when the plaintiff gave in evidence a book kept by the trustees, which contained an entry, dated the 22d July, 1837, directing the tolls of the said gate to be set at the rent aforesaid, and a setting accordingly to the defendant, of said gate, at said rent of £172 a-year. There was an agreement stamp upon this entry, and it was signed by seven trustees, and also by the defendants. The possession of the toll-gate by the defendant was also proved

Where trustees of a road entered into an agreement for the tolls of a gate upon the road with A., for a certain rent by the year, and A. took possession of the gate and received the tolls—*Held* that they are entitled to recover in an action of *assumpsit* on the agreement although they could demise only by deed. *Held also*, that a new trial will not be granted upon the ground

that the count upon the agreement was not properly framed, when a proper count could have been framed. *Semble*—That the action of *assumpsit* for the use and occupation of an incorporeal hereditament does not lie.

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EJECTOR.

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and several promises by him to pay this sum before action brought. When the plaintiff's case closed, counsel for the defendant called for a nonsuit, or that the Judge should direct the jury to find for the defendant; on the ground that, under the 35th sec. of the act, the contract for the rent should be under seal, and that as there was no demise by deed, the plaintiff was not entitled to recover. The learned Judge refused to nonsuit, or to direct the jury to find for the defendant, but saved the point, with liberty for the defendant to move to enter a nonsuit. Counsel for the defendant obtained, on a former day, a rule nisi for this purpose, against which

Mr. *Henn*, Q. C., with whom was Mr. *Collins*, Q. C., now shewed cause.—The objection to the verdict in this case is, that tolls being an incorporeal hereditament, they could pass only by deed, and that there was no demise by deed in this case. There was an agreement to let the tolls for £172 a-year; and by virtue of that agreement, the defendant received these tolls for the space of a year. We are not driven to controvert the proposition, that incorporeal hereditaments can be demised only by deed, for a parol agreement for an incorporeal hereditament would sustain an action in *assumpsit*, when there has been possession and enjoyment under it. If this agreement had not been executed, it might be the subject of an action, as the defendant has an equitable interest, and enjoyment in the tolls. These principles are fully sustained with respect to tithes, and there can be no difference between tithes and tolls, in actions concerning them, being both incorporeal hereditaments. 2 *Eagle on Tithes*, 5; *Eaton v. Sherwin* (a); *Robinson v. Williams* (b). There are also several cases in which it has been held, that although corporations can demise only by deed, yet they can maintain an action in *assumpsit* for use and occupation, where the defendant has occupied under the corporation. *Mayor of Stafford v. Till* (c). And in the case of *The Mayor of Carmarthen v. Lewis* (d), it was expressly held, that use and occupation might be maintained for tolls; and also in the case of *Galbraith v. Gwynne* (e). On these grounds, the verdict cannot be disturbed.

Mr. *Cooper*, Q. C., and Mr. *Coppinger*, *contra*.—It is admitted that tithes are the only exception to the rule that incorporeal hereditaments cannot be demised, except by deed. Use and occupation cannot be maintained for tithes, but 2 & 3 W. 4 c. 119, s. 16. gives the action of *assumpsit*; and in cases where the act does not apply, there may be a count for tithes bargained and sold, but there cannot be use and occu-

(a) 2 Show. 314.

(c) 12 Moo. 260. S. C.; 4 Bing. 75.

(e) Hayes 244.

(l) 9 Price, 136.

(d) 6 C. & P. 608.

pation for tithes. The same words that are in this act are also in the English turnpike act, the 3 G. 4, c. 126; but so satisfied was the legislature that the common law would over-reach it, that it distinctly provides in the 57th sec. that there may be valid agreements for the tolls, without deed. The two first counts are not for the tolls, but they are for a contract to take the tolls; and that being so, the trustees were bound to tender a lease; and if the defendant refused to take the lease, they should have sued him for breach of his contract. These two counts are therefore out of the question; and as to the count for use and occupation, that can only be maintained for something substantial; tolls are not so—they are rent: and the defendant could not be put into possession of them except by deed. In the *Duke of Somerset v. Fogwell* (a), Mr. Justice Bailey, in his judgment, distinctly lays down this principle. In the case of *Galbraith v. Gwynne*, there was a demise of a mill, with toll appurtenant; in this case there was not a demise of even the gate, or any thing but the tolls.

Mr. Collins, Q. C., replied.—The words of the 35th sec. of the act authorise an agreement for the tolls in writing, and where the legislature expresses *writing*, it is the exclusion of *seal*. It is conceded that the trustees could have entered into a binding contract, if it satisfied the statute of frauds. In this case there are two special counts upon an agreement; the agreement was proved, and no objection taken to it. The case in *Shower* is sustained *in omnibus* by our special counts, and is precisely in point, and we have a general verdict taken upon these special counts. As to the third count, the words of the statute (b) do not refer exclusively to corporeal hereditaments; the contrary was distinctly ruled in *Galbraith v. Gwynne*, and in *The Mayor of Carmarthen v. Lewis*, Baron Parke says, “tolls are no doubt an incorporeal hereditament, and so are tithes; and you can maintain an action for the use and occupation of tithes:” and the same was held in *Bird v. Higginson* (c), and *Daniel v. Morgan* (d). The cases all go to this, that use and occupation will lie for an incorporeal hereditament when it has been enjoyed.

*Per* CRAMPTON J.—I am of opinion that this verdict must stand, without entering upon the point which has been chiefly discussed. I do not agree in the opinion that an action for the use and occupation of an incorporeal hereditament will lie. In the cases cited, the action was for an incorporeal hereditament incident to realty. It is, however, conceded, that an action upon the contract might be maintained for tolls. In this case the declaration contains two special counts upon the con-

(a) 5 B. &amp; Cr. 875.

(b) 23 &amp; 24 Geo. 3, c. 46.

(c) 1 Har. &amp; Wol. 61.

(d) 4 B. &amp; Cr. 8.

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tract, and the count for use and occupation. It does not state a demise, but it states the contract, the entry and enjoyment by the defendant, and that the contract was broken. The defendant has had the consideration, and he is bound to pay for it. The objection taken at the trial was, that the plaintiff could not recover, because there was no demise. But he is entitled to recover upon the agreement; and if the form of the declaration in this case be not proper, a proper count might have been framed, on which the plaintiff could recover. This is my impression at present.

On a subsequent day, the learned Judge directed that the verdict should stand.

Rule discharged.

Saturday, November 23d.

### MANDAMUS—DISPENSARY—MEDICAL SUPERINTENDENTS' QUALIFICATION.

The QUEEN v. FAIRTLOUGH and HALLARAN.

On motion for a *mandamus* to the treasurer and secretary of a dispensary, to remove the names of two gentlemen who had been elected as medical superintendents, and to enter the name of a third candidate who was not elected; where due notice of the objections is not given to the voters,  
*Held*, that it is not necessary that a candidate should have his diploma at the time of election, if he has passed his final examination for it.

Mr. MICHAEL BARRY, in Easter Term, obtained a rule *nisi* for a writ of *mandamus* to issue, directed to the defendants, as treasurer and secretary of the dispensary at Macroom, in the county of Cork, commanding them to remove the names of Warren Crooke and William Barry, as physicians or medical superintendents duly elected to said dispensary, and to enter the name of Valentine M'Swiney, as physician or medical superintendent duly elected thereto, and to deliver up to him the books connected with the situation of such medical attendant. By the affidavits in support of the rule, and those used upon shewing cause against it, the case appeared to be as follows:—It was determined, by a bye-law, not to elect any person for the medical department of this institution, who was not properly qualified, from corresponding testimonials, to act physician, surgeon, and man-midwife. Some time previously an advertisement appeared in the Cork Papers, stating, that on the 7th of April last, a meeting of subscribers would be held, to elect two medical superintendents for the Macroom dispensary, and requiring the several candidates to send in their testimonials to be examined by a committee. Amongst the testimonials sent in by Doctor Crooke was a certificate, from the Professor of Medicine in the University of Glasgow,

*Held*, also, that although a bye-law requires a superintendent to be properly qualified by corresponding testimonials to act as physician, surgeon, and man-midwife, it is not necessary to have a distinct diploma in midwifery, if the general diploma in surgery qualifies the holder to practice in that department.

stating that he had been examined and approved of, by public examiners, for the degree of Doctor of Medicine, and that he would obtain his diploma on the 25th of April. The want of this diploma was the ground of objection to his election. Doctor Barry's testimonials did not include a midwifery diploma, and this formed the ground of objection to him; but he produced a certificate of having attended a course of midwifery lectures; and it also appeared that he underwent an examination on that subject, on the occasion of obtaining his diploma in surgery, and that that diploma qualified him to practice man-midwifery. These two gentlemen, and Doctor M'Swiney being the only candidates, on the 7th of April were duly proposed, and no written objection was tendered to the chairman or other governor of the institution: but one subscriber, Mr. Ashe, swore that he protested against the nomination of any candidate whose qualifications were not conformable to the bye-law; while another, Mr. Martin, deposed, that although Mr. Ashe made this objection, he did not persist in it, and that there was no caution given that the persons who voted for any particular candidate would throw away their votes. The election proceeded, when there appeared 34 votes for Doctor Crooke, 23 for Doctor Barry, and 16 for Doctor M'Swiney. A protest was then entered upon the books, against the election of the two former, signed by three of the governors, one of whom was Mr. Ashe, who, it appeared, voted for Dr. Crooke. A subsequent meeting of the subscribers was held on the 12th of May, for the purpose of electing officers for the following year, and for auditing the accounts, at which Doctor Crooke produced his diploma as physician, and Doctor Barry a letter from the secretary of the Royal College of Surgeons in Edinburgh, in which it was stated that his diploma entitled the holder to practice as an accoucheur; upon which a resolution was passed, confirming the election of the 7th April. Doctors Crooke and Barry were not to enter upon their duties until the 1st of June. A majority of the committee to whom the testimonials were referred, determined that each of the three gentlemen were qualified to stand as candidates.

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Sergeant *Greene*, with whom was Sergeant *Jackson*, now shewed cause. The advertisement in this case was for the election of two medical superintendents. The public meeting elected two, and the conditional order is for a *mandamus* to substitute the name of one person for these two, which is clearly wrong. With respect to qualification, the bye-law means no more than this, that the superintendent shall be duly qualified in the three departments mentioned in it; and there is no pretence for saying that Doctor Crooke was not duly qualified, having passed every examination he had to undergo, and having nothing more to do than perform the ceremony of appearing at Glas-



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gow, to take out his diploma; and as to Doctor Barry, although he has not distinct diplomas in these several departments, not having a diploma in midwifery, yet he has what is tantamount, for it has been clearly shewn that, to obtain his surgical diploma in Edinburgh, he underwent an examination in midwifery, and that this diploma qualifies him to practice in that department. Even supposing the persons elected are disqualified, in order to invalidate the votes of the electors, it must be shewn that they knew they voted for persons not qualified to serve. *Rex v. Mayor of Cambridge (a)*. There might be good ground to sustain the rule, if the objection was made at the meeting, and that the voters were cautioned that they were throwing away their votes; but, as the contrary is clear from the affidavits, the objection comes too late now. *Rex v. Parry (b)*; *Rex v. Bridge (c)*. These decisions were made with respect to corporations, and the present is by no means so strong a case, being an association of voluntary subscribers, whose bye-laws are very different from the bye-laws of a corporation; they are made by themselves, and, in the present election, they have conscientiously endeavoured to satisfy themselves that the qualifications of the gentlemen selected are conformable to their own bye-law.

Mr. Pigot, Q. C., and Mr. Barry, *contra*.—The frame of the order goes to remove a plurality of persons, and to substitute the name of the applicant in place of either of them. The parties to whom the order is directed will reform the books, and whatever they may do with one or other, or both of the elected, they will enter, as duly elected, the name of Doctor M'Swiney. The court must throw out of its consideration the meeting of the 12th of May, and upon the 7th of April Dr. Crooke was ineligible. His election on the 7th of April was therefore null and void; and no resolution at a subsequent meeting can confirm an election which was originally null and void. The qualifications of medical men are established documents, and these neither of the gentlemen elected possessed in all the departments when elected, and the bye-law requiring these qualifications is as binding as if the legislature required them. The testimonials they presented were private documents from the officers of the institutions in which they were educated, and not the recognised testimonials of medical men, which could be in the present case the only evidence of the qualification of the candidates.

*Per Curiam*.—The conditional order in this case is for a *mandamus* to the defendants, to remove the names of Doctors Crooke and Barry, and substitute that of Doctor M'Swiney. This is the fair effect of the

(a) 4 Bur. 2008.

(b) 14 East. 549.

(c) 1 M. & Sel. 76.

order, that the latter should be substituted for the two former. Now, Doctor Crooke has 34 votes out of 40, and Doctor Barry 23, while the applicant has but 16. But Doctor M'Swiney says the majority over him consists of votes thrown away, as having been given for two persons who were ineligible. The general doctrine is, that when an objection of this kind is to be relied upon, the persons who are voting should have notice of the objection; and in this case, Mr. Ashe, who made the objection, which, it is sworn he afterwards withdrew, voted for one of these persons. If the transaction of the 12th of May added nothing to the validity of the election of the 7th of April, neither did it take any thing away from it, and it appears to me that this motion is not founded on merits, or regular in point of form.

Rule discharged, with costs.

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*Monday, November 26th.*

# REPLEVIN—PRACTICE—AMENDMENT—BANKRUPTCY.

O'CONNOR v. BENTLEY, Assignee of M'GRANE, and others.

This was a motion for liberty to file an additional avowry or avowries, and also to change the gale days in the avowry already filed, from half-yearly to quarterly days. It appeared from the affidavit of the defendant, Bentley, that he was sole assignee of Christopher M'Grane, a bankrupt; that on the 26th of December, 1835, he caused certain lands held by the plaintiff, under a lease from M'Grane, to be distrained for rent in arrear; the declaration in replevin was filed on the 12th of February, 1836, and on the 22d of April an avowry was filed, justifying the distress, as for rent, up to and for the 25th of March, 1835; and the tenancy was stated to have been under M'Grane at the time when the rent became due. The plaintiff put in four pleas, to one of which the defendant demurred; the demurrer was set down for argument, in *Michaelmas* term, 1836, but was not then argued, or for several terms afterwards, in consequence of an amicable arrangement having been set on foot, and which was pending until the 18th of April, 1838, when the defendants entered and served the usual rule to proceed, compromise being broken off. The demurrer was argued in *Trinity* term, and judgment given on the 11th of June, for the defendants, with costs, which deponent could never since recover; that previous to this term, finding it was not the intention of the plaintiff to proceed to trial, this deponent instructed his attorney to serve notice of trial; and upon a consultation, for the purpose of preparing for trial, it appeared to

A defendant in replevin was allowed to amend, by adding additional avowries, where the original avowry was filed on the 22d April 1836; as it appeared that the necessity for the amendment was recently discovered, and the delay that occurred was owing to a compromise which was pending between the parties.

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counsel that a question might be raised, whether the title of the defendant did not relate back to a period antecedent to the 25th of March, although the commission of bankruptcy did not issue until the 31st, and suggested that an additional avowry should be filed, *which was the first time this deponent was aware of the necessity of this amendment*: that an amicable arrangement was again suggested by his counsel, and in the hope of effecting it, he delayed serving notice of the motion to amend, until he received a notice of trial from the plaintiff; and upon the same day, a notice of motion to amend the avowries was served. The affidavit contained a positive statement of a just defence upon the merits, and that the error as to the gale days was not discovered until a few days before. \*

Mr. *Macdonagh*, with whom were Sergeant *Greene* and Mr. *Holmes*, in support of the motion.—It is remarkable, that the defendant is the party who has been at every stage speeding the cause, and although there has been considerable delay, that is sufficiently accounted for, by the compromise which was pending. Regarding the avowry as a declaration, the court will allow such an amendment as the first, if the cause of action, or of avowry, is substantially the same; and whether it be stated to have arisen in the time of the bankrupt or his assignee, it is substantially the same. *Freen v. Cooper (a)*. There is an old rule, that after two terms a new avowry cannot be added, but at present it is well established that the court will give leave to file a new avowry, where the cause of action is not varied; and in *Prior v. Buckingham (b)*, the court allowed several avowries to be amended, and new avowries added, although issue had been joined, and notice of trial given and countermanded, and more than two terms had elapsed previously to the application for the amendment; and this, although notice of trial was countermanded on the 18th of July, 1823, and the rule to amend was not applied for, until

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\* The first part of this application came before Mr. Justice CRAMPTON, on the 17th of November, and was argued by Sergeant *Greene*, and Mr. *Holmes*, for the defendant, and by Mr. *West*, Q. C., and Mr. *Napier*, for the plaintiff when the learned Judge refused the application, chiefly upon the ground of the length of time

which had elapsed since the filing of the avowries. The affidavit on which the present motion was founded was rendered more precise than the former, particularly by the passages marked in italics. The arguments advanced, and the authorities cited on both days, are combined in the report.

(a) 6 Taunt. 258. S. C. 2 Marsh. 59.

(b) 8 Moore 524

the 29th of January, 1824, thus, passing over *Michaelmas* Term. So also, leave was given to amend a declaration by introducing new counts, after the cause had been taken down to the Assizes, and the record withdrawn; the rule being, that you may at any time introduce a new count, if you do not thereby introduce a new cause of action. *Morris v. Evans* (a). Even in penal actions, where it is the policy of the law to prevent such actions being held over persons' heads, the courts allow similar amendments. *Bonfield q. t. v. Milner* (b); *Mace q. t. v. Lovett* (c). No objection can arise, as to the proposed amendment being made so close upon the trial. *Rex v. Wilkes* (d). Upon these authorities an amendment in the present case, justifying the taking for the same rent and under the same instrument, and varying nothing but the statement of the tenancy, lest an act of bankruptcy might be proved to have been committed before the 25th of March, although the commission did not issue until the 31st, cannot be resisted. As to the other amendment, there are several cases in which the courts have gone much further. *Dryden v. Langley* (e); *Brown v. Layce* (f). Not a fact in our affidavit has been controverted.

Mr. Napier, *contra*.—There can be no objection to the second amendment, because it might have been made at the trial (g). As to the first, it comes now before the court on substantially the same grounds as when it was decided by Mr. Justice Crampton; and it is a very inconvenient and unusual practice to call thus upon the court to review its own decisions. What was the ground of that decision? The delay which had occurred from the filing of the avowries; and that objection is as strong now as on the former occasion, although the defendant endeavoured to mend his hand. There is not one word in the affidavit, to shew that the defendant was not long ago aware of the period at which the act of bankruptcy was committed; and there is no more settled rule, than that a party disentitles himself to a favor of this kind, if he delay in applying to the court. There will not be greater facility allowed for the amendment of avowries than of pleas, and the courts have never gone so far with respect to pleas, as the defendant calls upon your Lordships to go with respect to avowries. The case of *Munnings v. Lennox* (h) is very like the present, only that the amendment sought was of pleas in that case. There was a demurrer, and after the decision upon it, the defendant moved for leave to add two additional pleas, on an affidavit stating that, since the argument upon the demurrer, some circumstances had come to his knowledge, for the first time, which, the deponent believed, would

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(a) 1 Dow. P. C. 657.

(c) 5 Bur. 2833.

(e) Barnes' Notes, 22.

(g) Sed Vide *Ryder v. Malbon*, 3 C. & P. 594.

(b) 2 Bur. 1096.

(d) 4 Bur. 2527.

(f) 4 Taunt. 320.

(h) 12 Moore, 133.

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form a good ground of defence to the action, and the court refused the application. It is not disputed that the courts will allow amendments; but where there is considerable delay, it must be accounted for. After a lapse of seven terms, the court refused to allow an amendment, by changing a count in trover into a count in detinue, and adding a count in debt; *Green v. Mitton* (a); and in that case, in giving judgment, the court said, a compliance with the motion would be establishing a very dangerous precedent; and where defendant allowed a term to pass by, leave to file additional pleas was also refused. *Bludwisk v. Usborne* (b). It is another dangerous precedent to establish this, that where one judge sits alone, and rules a case, that decision is to be reviewed and reversed by the full court.

Sergeant *Greene* replied.—This is nothing but a struggle on the part of the plaintiff to exclude the merits of the case. There is no affidavit that the rent is not due, nor is there a single averment in the defendant's affidavit denied. There never was a more formal amendment than that we seek, or one which it could be more conducive to justice to allow. It is merely to meet a fiction of the law, which would refer the title of the assignee back to a period antecedent to the 25th of March, although the commission under which he was appointed did not issue until the 31st of March. The court, which allowed the amendments in *Prior v. Buckingham*, could not hesitate about granting the present motion. At common law, while the proceedings are in paper, amendments are almost a matter of course (c); and in *Waters v. Bovell* (d) leave was given to add a plea, after two terms since the first pleas were pleaded. The old rule, that after two terms amendments would not be permitted, is obsolete, and the courts have recently been much more liberal in allowing amendments. In *Williams v. Pratt* (e) the plaintiff was allowed to amend, after having been non-suited; and in *Cope v. Marshall* (f) the replication was amended after the cause had been made a *remanet*. And in *Dale v. Gordon* (g) an amendment was allowed, after the case had been referred to arbitration, and an award made thereon. The answer to *Green v. Mitton* is, that it was an attempt to stretch amendments further than they had been ever carried before, for it was sought to alter the form of action, to change trover into *detinue* and debt, which is totally different from the present application. In England, since the 3 & 4 W. 4, c. 42, this application would be unnecessary, for if the judge at the trial was of opinion that the title of the assignee related back to a period antecedent to the 25th of March, he would order the avowry to

(a) 1 Nev. & M. 673.

(c) 1 Tidd. 711.

(e) 5 B. & Al. 896

(b) Barnes' Notes, 19.

(d) 1 Wils. 223.

(f) Sayers. 285.

(g) 3 Mo. & Sc. 329.

be amended to meet that state of facts. This affords a strong argument in favor of our view; the second amendment is not resisted, because it can be made at the trial; the same could be done with respect to the first, in England, and we are therefore entitled to the assistance of the court to enable us to make it here. Our affidavit fully accounts for the delay; the amendment was matter of law, and it is not surprising that it should have remained unnoticed, until counsel came to advise proofs. The effect of refusing this motion will be to turn us out of court; and we have sworn to merits, and that if the motion be not complied with, our rent will be lost. In *Storr v. Watson* (a) an amendment was allowed, by substituting a count in trover for a count in case, after issue joined, and the ground stated in the judgment was to avoid expense; and in a note to this case the authorities are all collected, and strongly sustain our views. The general rule is, "will any injustice be done?" as stated by Mr. Justice Park, in *Taylor v. Lyon* (b), if not, the amendment will be allowed. Here it is not denied that we have a just cause of action, and the effect of refusing this motion will be, that the defendant will lose not only his rent, but the costs of a record. It is a well established rule, that whatever indulgence is granted to a plaintiff, more is always given to a defendant, and an avowant is included within this rule.—*Tidd's Practice*, 708. No dangerous precedent will be established by conceding this motion, but a most dangerous one if a party will be allowed to be active in a compromise, and then make use of the time thus wasted, in order to defeat the just claims of his opponent.

BUSHE, C. J.—We are all of opinion that this motion should be granted, on the terms offered in the defendant's notice, and upon payment of the costs of this motion, and also the costs of the motion on the 17th of November.

Motion granted.

(a) 2 Scott 842.

(b) 5 Bing. 325.

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## EXCHEQUER OF PLEAS.

Tuesday, November 13th, 1838.

PLEADING—DEBT ON BOND AGAINST HEIR OF OBLIGOR—EXECUTION—SATISFACTION OF DEBT.

DENIS HEWITT, surviving Executor of CATHERINE HEWITT,  
deceased, v. JAMES M'GEOWN.

Debt on bond against the heir of the obligor.

*Plea:*—That the plaintiff recovered a judgment on the same bond against the administratrix of the obligor, and sued out a *ca. sa.* under which the administratrix was arrested, and was in custody.

*Replication:* That she was discharged under the insolvent act, and that the judgment debt and damages remained unpaid.

*Rejoinder:* That at the time of the commencement of this action, the administratrix was still in custody under the *ca. sa.*

*Held,* on demurrer, that the rejoinder and plea were bad; the judgment and execution against the personal representative not being a satisfaction of the debt as against the heir, who was liable in respect of the real assets descended to him.

DEBT ON BOND by the surviving executor of the obligee against the heir of the obligor. The second plea was to the effect that the plaintiff, before exhibiting his bill against the defendant, impleaded Theodosia M'Geown, as administratrix of John M'Geown (the obligor), in a plea of debt for the detaining and not paying the same debt, &c., and on foot of the same writing obligatory in the declaration mentioned; and that such proceedings were thereupon had, that the plaintiff recovered judgment in that suit against the said Theodosia M'Geown, the said administratrix: *prout patet*, &c. That the said judgment being in full force and unsatisfied, the plaintiff, for having execution thereof, sued out a *capias ad satisfaciendum* upon the said judgment against the said Theodosia M'Geown, directed to the sheriff of, &c., duly marked, &c.; that the *capias ad satisfaciendum* was delivered to the sheriff, and the administratrix arrested under it; and that she still remained in the custody of the sheriff under that writ. Verification.

*Replication.*—That after the arrest of the administratrix, under the *capias ad satisfaciendum*, as in the second plea mentioned, by an order made by the court for the relief of insolvent debtors in Ireland, the administratrix was duly discharged under the insolvent act; that said order still remained in force, and that the said judgment debt and damages were wholly due and unpaid.

*Rejoinder.*—That true it was, that the administratrix had been discharged, as in the replication alleged, but that at the time plaintiff exhibited his bill against the defendant, the administratrix was still in custody, under the *capias ad satisfaciendum*, and had not been discharged as an insolvent.

Demurrer, and special causes assigned: that the rejoinder did not deny, confess, or avoid the substantial matter in the replication; that it was no answer to the replication, or to the declaration; that it

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attempted to put in issue an immaterial point; and that it was uncertain, informal, and insufficient. Joinder in demurrer \*

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Mr. *Robert Andrews*, for the demurrer.—The rejoinder is no answer to the replication, and the plea is no answer to the declaration. The defendant, by his pleadings, relies on the taking of the administratrix under the *ca. sa.*, as being a satisfaction as against the heir. But the execution of the *ca. sa.* against the administratrix cannot have that operation. First, even as against the same person, the execution of a *ca. sa.* is not a satisfaction; it merely bars (at common law) any further remedy against that person. It does not extinguish the debt, it only bars the remedy against the debtor, *Taylor v. Waters* (a); *Foster v. Jackson* (b). And even as against the same person, that unreasonable operation of the common law has been obviated by the statutes 33 G. 3, Ir. c. 42, s. 28, and 35 G. 3, Ir. c. 30, s. 31, and these statutes contain a legislative declaration or statement of the common law in this respect, in the recital of the evil they were intended to remedy. They recite, “that it is not reasonable that a creditor, by proceeding against the person of his debtor for the purpose of compelling him to do what is just, should lose or be deprived of his execution against his debtor’s estate,” &c. Under the latter of these statutes, the 35th G. 3, it has been decided that a *fi. fa.* sued out against the goods of a debtor, in confinement under a *ca. sa.* upon the same judgment, is not irregular, *Brien v. Brien* (c); and that a creditor who has detained his debtor on a *ca. sa.* may issue execution against his lands or goods, without previously discharging him from custody, *Barton v. Seymour* (d). Secondly, as against different persons, it is no satisfaction as against one, to have taken another person jointly liable on a *ca. sa.*, *Foster v. Jackson*; *ubi. sup.*; *Blomfield’s case* (e). The latter case, as reported in 1 Cro. Eliz., is very clear as to this point. It establishes, that if two are condemned in debt, and one taken on a *ca. sa.*, and afterwards suffered by the sheriff voluntarily to go at large, and the other, being then taken in execution, would have upon this matter maintained an *audita querela*, that nevertheless, this is not any cause to discharge him. And in the same case, as it is reported in 5 Co. Rep., it is stated to be law, that if two be condemned in debt, and one be taken and die in execution, the taking of the other is lawful; and the reason seems to be, that execution of the

(a) 5 M. & S. 104; S. C. 2 Chit. Rep. 307.

(b) Hob. 59.

(c) 1 Hud. & Bro. 300, n.

(d) 1 Hud. & Bro. 301, n.

(e) 1 Cro. Eliz. 478; S. C. 5 Co. Rep. 174; and see 5 Co. Rep. by Thomas and Fraser, note c. p. 175.

\* This case was argued in last *Hilary* Term, but the court directed a re-argument.



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*body is no satisfaction, but a gage for the debt.* The next question is, as to the right to sue both the heir and administratrix. Where the obligor, as here, binds his heirs and executors, &c., the right to sue on his death is several, and the bond as against the heir and executor is *quasi* a several bond, with this limitation, that neither heir nor executor is liable to have payment enforced against him, unless the former has real estate of the ancestor, or the latter has personality of the testator. As to the right to sue, it is clear that the obligee may sue either the heir or the executor, *Davies v. Churchman* (a); and the heir cannot plead that the executor or administrator has assets, *Davys v. Pepys* (b). Neither can the heir plead that there is another action pending against him as executor, *Haight v. Langham* (c); nor that the plaintiff has recovered part against the executor or administrator, *ib.*; and in this case of *Haight v. Langham*, the only difficulty arose from the same person being both heir and executor; it seems to have been conceded that no difficulty would have arisen, if the heir had been a different person from the executor.—[FOSTER, B. The ground principally relied upon on the former argument was, that the bond was merged in the previous judgment obtained thereon against the administratrix.]—The case of *Haight v. Langham*, is conclusive as to this novel application of the doctrine of merger, for it admits that the obligee can recover part against the heir, and part against the personal representative, which is a clear admission, that there can be two separate judgments on the same bond; one against the heir, and another against the personal representative, and, therefore, that as against one of them, there is no merger of the bond in the judgment obtained against the other. It is every day's practice to sue joint and several obligors severally, and obtain several judgments; and no person has ever attempted to argue that, as to one of such several obligors, the bond has merged in a judgment previously obtained against a co-obligor.—[PENNEFATHER, B. If the mere obtaining of a judgment against one obligor were to operate in that manner as to the others, there would be no use in procuring co-obligors to join severally in the same bond.]

Mr. Tomb and Mr. Nelson, *contra*.—The facts stated on the pleadings furnish an answer to the action, upon two grounds.—First, at the time of its commencement, the debt was satisfied, as against the defendant, by the administratrix being in custody under the *capias ad satisfaciendum* in another action, and the case cannot be varied by any thing that has since taken place. The plaintiff had no right to take a new proceeding while he had the administratrix in custody. At common law, the *capias ad satisfaciendum* discharged the debt, so long, at

(a) 3 Lev. 189.

(b) 2 Pl. Com. 439. b.

(c) 3 Lev. 303, 304.

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least, as the administratrix remained in custody. 2 *Tidd*, 996. The two Irish acts which have been cited, allowing several concurrent executions, apply only to executions issuing on the same judgment, and do not provide for a case like the present.—[PENNEFATHER, B. They do not provide for a case like the present *in terms*, but if your argument be right, the present is a case within the mischief intended to be remedied by those acts; and may it not be argued, that if this further mischief had existed, it would have been also remedied?—By the judgment which has been obtained against the administratrix, the bond is merged, and cannot be made the subject of a new action—*transit in rem judicatam*. By the judgment, the debt has been converted into a personal demand against the administratrix. *Higgins' Case* (a). This has been argued as if it were the case of a joint and several bond, but the distinction between a joint and several and a single bond was expressly taken in the case last cited. The rule seems to be, that a merger takes place where there is privity between the parties. That there is privity between the heir and the personal representative is clear. It is said in *Bro. Abr. Monstrans*, pl. 61, that the heir cannot plead a release to the executor, without shewing it, for there is privity between them. In *Com. Dig. Pleader*, 2 E. 3, also, it is said, that the heir may plead a bond by the executor or administrator for the same debt; and in *Foster v. Jackson* (b) the same doctrine is laid down.—[CHIEF BARON. If there be a complete identity between the heir and the executor, the one may plead an action pending against the other, in the same way that when an individual is sued, he may plead another action pending against him for the same subject matter.]—The heir cannot plead another action pending against the executor, but he may plead that the obligee has elected to go on to judgment and execution against the executor, and thereby merged the judgment, *Davys v. Pepys* (c). It is submitted that the plaintiff cannot proceed on a bond, which, in Lord Coke's time, would have been given up to be cancelled, as completely merged in the judgment.—[RICHARDS, B. That is, merged so far as relates to the person who is sued; but here the action is against a different person, namely, the heir. PENNEFATHER, B. On the death of the obligor, it may be said, that the bond becomes a *quasi* several bond as against the heir and personal representative.]—That is what is contended for on the other side, but there is no authority to sustain such a proposition. So long as the judgment remains in force, the obligee or his representative cannot bring a new action on the bond, *Higgins' Case*; *Stileman v. Ashdown* (d); *Ex-parte Christy and others* (e).

(a) 6 Co. Rep. 45.

(b) Hob. 59.

(c) Plowd. 438.

(d) 2 Atk. 608.

(e) 2 Deac &amp; Chit. 155.

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Mr. *Gilmore*, Q.C., in reply, being directed by the court to confine himself to the consideration of the question, as to whether there had not been a satisfaction of the debt by the taking of the administratrix in execution, contended, that where two persons were liable to the same debt, the discharge of one from execution was not a satisfaction of the debt, as to the other, unless such discharge took place with the consent of the plaintiff. In support of that position, he cited the following authorities, *Bro. Abr. Execution*, fol. 304, pl. 133; *Bloomfield's Case* (a); *Macdonald v. Bovington* (b); *Nadin v. Battle and another* (c). In the last mentioned case it was decided, that if one of two defendants taken on a *ca. sa.* be discharged under an insolvent act, it will not operate as a discharge of the other.

WOLFE, C.B.—The court are of opinion, that the judgment and execution against the administratrix, and her discharge under the insolvent act, cannot be relied on by the heir to bar the present action. The cases which have been cited seem to the court to establish this proposition, that a mere arrest under a *capias ad satisfaciendum* does not satisfy the debt, and that, consequently, there has been no satisfaction of the debt in the present case. The debt, therefore, remaining unsatisfied, the court see no reason why the defendant should not be proceeded against on foot of the bond. Judgment and execution against the personal representative are not a satisfaction of the debt as against the heir, and do not, in the opinion of the court, present any legal bar to his being made answerable for the debt, in respect of the real estate descended to him, from which his liability arises.

Demurrer allowed.

(a) 5 Co. Rep. 57.

(b) 4 T. R. 825.

(c) 5 East. 147.

*Tuesday, November 13th, and Monday, November 26th.*

**BILL OF EXCHANGE—ACCEPTANCE—PLEADING—  
EVIDENCE—NOTICE OF DISHONOR.**

**LEDLIE v. LOCKHART.**

**ASSUMPSIT** by the indorsee against the drawer and indorser of a bill of exchange.

The first count of the declaration stated that the defendant, on the 1st of May, 1835, at, &c. made his bill of exchange, and directed the same to one James Ledlie, and thereby required him to pay to the defendant's order £170. 19s., four months after the date thereof, which period was then elapsed; and that the defendant then and there indorsed the said bill to the plaintiff; and that the said James Ledlie did not pay the said bill, although the same was there presented to him on the day when it became due, whereof the defendant then and there had due notice. The declaration contained other counts. To the first count, the defendant pleaded *non assumpsit*.

At the trial, before TORRENS, J., at the Spring Assizes, 1837, for Armagh, a bill of exceptions was taken, by which the case appeared to be as follows:—In support of the first count, the plaintiff gave in evidence the following bill of exchange:—

“£170 : 19 : 0.

“Newry, 1st of May, 1835.

“Four months after date, pay to my order the sum of £170 19s., value received.

“GEO. LOCKHART.

“To Mr. James Ledlie, High-street.

(Accepted.)

“JAMES LEDLIE.

“Payable at 20, High-street, Newry.

(Indorsed) “GEO. LOCKHART.

“SAML. LEDLIE & Co.”

The plaintiff was a merchant in Newry, and carried on business there, under the firm of Samuel Ledlie & Co., and the defendant was his apprentice. James Ledlie (the drawee) also carried on business in Newry. The bill in question was his debt, but before it fell due he became embarrassed in his circumstances. On the 4th of September, 1835, when the bill fell due, it was presented at No. 20, High-street, Newry, and dishonored. The defendant, who had been in Dublin, returned to Newry on the 16th of September, when he had a conversation with one of the witnesses about the losses occasioned by James Ledlie's insolvency. On the 7th of September, in a further conversation with the same witness, the defendant said, that, amongst other losses, he was in for this bill, and that he did not wish his father and mother to know any thing about it, but wished it might be settled secretly. The defendant

In a declaration by the indorsee against the indorser of a bill of exchange, accepted payable at a particular place, it is not necessary to notice the special acceptance, or to aver a presentment at such place.

It is sufficient to state a general presentment to the drawee, without stating any acceptance, and to prove the presentment at the particular place pointed out by the acceptance.

Where the defendant (the drawer and indorser), after the bill was dishonored by the acceptor, spoke of the bill, and the sum secured thereby, as amongst the losses likely to arise to him by the insolvency and default of the acceptor, this was held to be evidence to go to the jury, that the defendant had received due notice of dishonor of the bill.

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also put down on paper £170. 19s., the amount of the bill, amongst other losses likely to result to him from James Ledlie's insolvency. In a subsequent conversation with another witness, the defendant dwelt on the bill as one of his losses.

The case having closed on both sides, counsel for the defendant called on the learned Judge to direct the jury to find a verdict for the defendant, on the first count of the declaration, inasmuch as there was a variance between the bill declared on and that given in evidence, and that the declaration should have averred the special acceptance, and that the bill had been presented at the place where, it was alleged, it had been specially accepted. They further contended, that no notice of the dishonor of the bill having been proved to have been given to the defendant, his Lordship ought to charge the jury, on that ground also, to find a verdict for the defendant. The learned Judge refused so to direct the jury, being of opinion, upon the first point, that there was no variance; and, upon the second point, his Lordship told the jury, "That there was evidence to go to them of the defendant having acknowledged his liability to discharge this bill, as the indorser thereof; that the law did not hold the indorser liable to the payment of such a security, except due notice was given to him of the dishonor of the bill; that in this case, there was no actual proof of such notice having been given, but there were circumstances in the case which, in his opinion, were for the said jurors to consider, whether the defendant, from the facts proved, and the conversations held with the different witnesses, had not considered himself liable, in point of law, to the payment of the bill, and by so doing had superseded and dispensed with the necessity of that proof of the notice of the dishonor of the bill, which, in general, it is requisite for a plaintiff, suing in the capacity of an indorsee against an indorser, to prove, in order to sustain his right of action."

Whereupon, the defendant's counsel excepted to the charge of the learned Judge on both the points above adverted to. The jury found a verdict for the plaintiff for the amount of the bill.

Mr. Napier, in support of the exceptions.—The declaration here deals with the bill as accepted generally, or not accepted at all; but the real question is, whether, as against the drawer, the bill is not to be considered as a special acceptance. Before the statute 1 & 2 G. 4, c. 78, the difference of opinion between the Court of King's Bench and the Court of Common Pleas in England was, whether, as against the *acceptor*, an acceptance like the present was general or special; but, as against the *drawer*, it was the doctrine of both courts, that such an acceptance was special, and that a presentment at the place should be averred in the declaration. This appears expressly stated by Bayley, J.,

in *Rowe v. Young* (a), and still more pointedly by Tyndal, C. J., in delivering the judgment of the Court of Error, in *Gibb v. Mather* (b). In the former case, the bill was accepted precisely as it has been accepted here, and the first sentence in the judgment of Bayley, J. exactly rules the present exception in favor of the defendant. The drawee may limit the drawer's liability, but he cannot expand it; and when the holder takes this qualified acceptance, the contract between him and the drawer becomes qualified, by the interposition of a condition precedent to the drawer's liability to pay. The holder might refuse to take the bill thus accepted; but when he takes it, he assents to the alteration of the contract. The court of Common Pleas held, that, both as against the drawer and acceptor, such an acceptance was a qualified acceptance, *Gammon v. Schmoll* (c); and this is clearly the correct doctrine.

[CHIEF BARON.—If the acceptance need be stated at all, it ought to be stated as a qualified acceptance, in a case like the present.]—*Gammon v. Schmoll* is an express authority that the acceptance must be stated in the declaration, and presentment at the place averred.—[FOSTER, B. Your objection to the mode of pleading in the present case is this, (and I confess it appears a very strong one,) that, consistently with the averment, the bill may have been presented for payment at a place different from that mentioned in the acceptance.]—Yes, the contract of the drawer in such a case is, that if the bill be presented *at the place* mentioned in the acceptance, and dishonored, and notice thereof be duly given to the drawer, he will pay. In the case of a *general* acceptance, the drawer's original contract is not varied by the acceptance, and, therefore, the acceptance need not be noticed; but, as a *special* acceptance qualifies the drawer's contract, it must be noticed, and the contract truly pleaded according to its legal effect. In *Huffam v. Ellis* (d), the action was brought by the indorsee against the drawers and indorsers of a bill, directed to the drawee, who accepted it, payable at the house of K. S. and A. The declaration stated the acceptance, and that when the bill became due, it was presented to K. S. and A. for payment, according to the tenor and effect of the acceptance. The principal error assigned by Abbott, for the plaintiffs in error, (the defendants below), was, that in an action against the drawer, presentment at the place, at which the bill is made payable, by the acceptance, should be averred. Wilson, for the defendant in error, did not controvert this proposition, but relied on the sufficiency of the averment. The report in *Taunton* gives an unsatisfactory account of the decision, but it is thus given by Mr. Justice Bayley, in his *Work on Bills* (e). "If a bill be stated to have been accepted, payable by certain

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(a) 2 Brod. &amp; Bing. 231.

(b) 2 C. &amp; J. 262.

(c) 5 Taunt. 344.

(d) 3 Taunt. 415.

(e) P. 299, 5th ed.

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"persons at a particular place, so as to make presentment at that place essential, an averment in an action against the drawer of a presentment to those persons generally, without saying at that place, is insufficient. But an allegation that it was presented to them, according to the tenor and effect of the bill and the acceptance thereof, will be sufficient." Lord Eldon was one of the Lords who heard the appeal, and took a part in the decision. In *Bush v. Kinnear* (a), the action was brought by the indorsee against the drawer and indorser. The bill was drawn upon A. B., and accepted payable at the house of Glynn, Mills, and Co. It was averred, that the bill was presented to Glynn, Mills, and Co., and also to the said A. B., for payment, and that the said Glynn, Mills, and Co. were required to pay, according to the tenor and effect of the said bill and acceptance thereof. The report states, that it was agreed, at the opening of the argument that a presentment at the place of acceptance was necessary, and, consequently, that the declaration ought to contain an averment to that effect, and that the only question was, whether it contained such an averment? *Huffam v. Ellis* (b) was referred to in the argument: that case was decided only five years before, and, therefore, must have been familiar to Abbott, J., then on the bench. Lord Ellenborough says, that, if he had been plaintiff, he would, perhaps, have amended his declaration; and all the court rely on the words, "according to the tenor, &c." as amounting to a substantive averment of presentment at the place.—[PENNEFATHER, B. In point of fact, this bill was presented at the proper place, and yet, we are now called on after verdict, to say, that where the declaration states a presentment generally, it must mean a presentment at a place different from the proper one.] The question arises upon a variance which is not affected by the verdict. The objection is, that the contract pleaded is not the contract offered in evidence, so that the verdict has nothing to do with the argument.—[RICHARDS, B. With respect to the case last cited, it may be said, that as a special acceptance appeared on the face of the declaration, it was necessary to aver presentment accordingly, and that therefore a general averment of presentment would not have been sufficient.] That distinction cannot affect the argument. The principle of the decision was, that the presentment alleged did not correspond with that required by the acceptance; and the objection must be as valid, where the acceptance appears in evidence, as where it is stated in the pleading. In the one case, the contract appears between different parts of the pleading, in the other, between the pleading and evidence. If the variance be immaterial in either, it must be so in both; and if the acceptance be an essential part of the contract, the contract must be made consistent with itself upon the pleading, and consistent with the pleading in the

(a) 6 M. &amp; S. 210.

(b) 3 Taunt. 415.

evidence. But, if the acceptance is altogether collateral to the drawer's liability, it would be surplusage, and the averment of presentment wholly immaterial. The principle of that case shews, that, in a *special* acceptance, the acceptance must be stated, as being an essential term of the contract. The fallacy arises from applying the rule in *Tanner v. Bean* (a) to a special acceptance. That was the case of a *general* acceptance, and the reasoning of Abbott, C. J., viz.—that the acceptance or non-acceptance, does not vary the liability of indorsers, clearly can only apply where there is no special acceptance. And this view is borne out by the note in 2 *Chit. Plead.* 158. a, (5th ed.), where the omission is confined to a general acceptance. In pleading a contract, nothing can be omitted, which, if inserted, would vary the contract. It is conceded, that if the acceptance be stated, presentment at the place must be alleged; that is, that the statement of the contract must be varied. The special acceptance so far varies the contract, that the holder might refuse to take the acceptance, and yet, it is said, this will not vary the pleading. If this be so, two contracts, differing materially and essentially, in their legal effect, may be expressed by the same declaration, and in the same words.—[PENNEFATHER, B. The argument is, that under a general averment of presentment like this, evidence of a particular mode of presentment cannot be given.]—The real question is, whether the bill has been set out according to its legal effect? My proposition is, that nothing should be omitted, which, if set out on the face of the declaration, would vary the contract. Otherwise, a contract may be misdescribed, without any possible mode of taking the legal objection to an admitted violation of legal principles. With respect to the question as to the effect of the statute 1 and 2 G. 4, c. 78, upon the law, in *Gibb v. Mather* (b), it was held, that the statute only applied to the case of acceptors, and did not vary the liability of drawers. In *Boyley on Bills*, 386, (5th ed.), it is laid down to be a fatal variance to omit *the place* in the declaration, unless (he says), the objection is remedied by the 1 & 2 Geo. 4, c. 78. As *Gibb v. Mather* decides, that the statute does not apply where the drawer is defendant, it is plain, that the place must be averred; and any authorities *contra* must have been decided in forgetfulness of this part of the decision in that case. The case of *Parks v. Edge* (c) is certainly an authority against this exception, but it is at variance with the plainest principles of pleading. Where the averment of presentment is, that the bill was presented to the acceptor, there, *place* is a mere circumstance; yet, in the case of a special acceptance, it is of the essence of the presentment. A plaintiff is entitled to a verdict, where he proves the averments in his declaration. Suppose here, he had proved presentment to the acceptor in Dublin, his

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(a) 4 B. & C. 312.

(b) 2 C. & J. 202.

(c) 1 C. & M. 429; S. C. 1 Dowl. P. C. 145, nom. *Parker v. Ade*.



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*pleading* would have been equally sustained as to presentment; and yet the defendant could not, in any other way than the present, make the objection. The invariable rule is, that the evidence shall be regulated by the pleading, whereas *Parks v. Edge* says, that the same pleading may require different evidence in different cases, and one part of the evidence will determine of what the remainder must consist. I profess myself wholly unable to understand the decision in *Parks v. Edge*; and on the former argument,\* the late Lord Chief Baron expressed a strong opinion against it. The court may think fit to act upon it; and, if so, I shall wait, with considerable anxiety, to hear an explanation of the principles on which it is to be sustained, and which, as yet, have not been suggested.†—As to the second exception, there was no proof of any notice of dishonor having been given to the defendant. The very utmost extent of the evidence would be this, that if the matter were quietly settled, defendant would have made no question about notice, as any dispute on that subject would make the matter public. It is clear, therefore, that there was no evidence of waiver; to sustain which, there should appear to be, first, indulgence agreed to and granted by the plaintiff; secondly, an express promise by the defendant, with the knowledge of all the circumstances, *Perkins v. Graham (a)*. The whole conversation appears manifestly to have had reference to a private settlement; and if there had been some such settlement acceded to by the plaintiff, the defendant, perhaps, might have waived notice. *Standage v. Creighton (b)* seems in principle to apply. On this point, there are authorities, conflicting with each other; it is needless to refer more particularly to them. Whenever the plain rule is departed from, the greatest confusion and inconvenience arises. It was the opinion of the late Chief Baron, that notice of the dishonor should be express, and that it should not be left to juries to guess (according to their caprice) at that which a plaintiff should expressly prove;‡ and, on the former argument, he intimated a very decided opinion in favor of the second exception.

PENNEFATHER, B. I agree with you, that it is much to be lamented that the plain rule, requiring express proof of notice, should ever have been departed from, but we must take the law as we find it.

(a) 1 C. & M. 725. See, also, *Donnelly v. Howie*, 2 Law Rec. N. S. 79.  
 (b) 5 C. & P. 406.

\* This case was argued in *Hilary Term* last, by Mr. Napier, in support of the exceptions, and by Mr. Robert Andrews, *contra*.

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† See the judgment of Best, C.J. in *Blythe v. Bampton*, 11 B. Moore, 391, which seems to support the argument of counsel.  
 ‡ See *Watson v. Minchin, Jones' Ex. Rep.* 590; S. C. 4 Law. Rec. N. S. 181.

Mr. *Tomb*, on the same side.—The first exception is grounded upon the variance between the bill declared on and that proved at the trial. It is submitted that the bill has not been truly described in the declaration. The statute 1 & 2 G. 4, c. 78, does not apply to the drawer of a bill, *Gibbs v. Mather* (a); and therefore the question as to him remains as at common law. Before the statute, all the Judges agreed that, as against the drawer, presentment at the place where the bill was made payable by the acceptor, was a *condition precedent*, *Parker v. Gordon* (b); *Ambrose v. Hopwood* (c); *Huffam v. Ellis* (d); *Bushe v. Kinnear* (e); *Callaghan v. Aylett* (f); *Gammon v. Schmoll* (g); *Fenton v. Goundry* (h); *Rowe v. Young* (i). In all these cases, it is treated as a condition precedent, which must be averred and proved. If there be any one rule of pleading better established than another, it is, that that which is a condition precedent to the plaintiff's recovery must be averred in his declaration, *Com. Dig. Pleader, C. 50*; *Id. ib. C. 51*. The holder of this bill, by taking it with this qualified acceptance, has imposed upon himself a condition precedent, namely, that he will present the bill for payment at the place where, by the acceptance, it is made payable. He has no title to sue, without performance of that condition; he ought, therefore, in his declaration, to have stated the special acceptance, and averred his presentment accordingly. The defendant, the drawer, is otherwise deceived and misled by the declaration. He might have come to the trial, prepared with evidence to negative a presentment for payment at the place specified in the acceptance.—[PENNEFATHER, B. It is unnecessary for the court to express any opinion upon a case in which a special acceptance is stated, as the declaration here does not state any acceptance; it, therefore, becomes a matter of evidence, and the question is, whether, under the averment of a general presentment to the drawee, a presentment at the particular place can be proved at the trial? And that is the very question decided by the court of Exchequer, in the case of *Parks v. Edge*.]—That case, it must be admitted, cannot be distinguished from the present, but it appears to be bad law. With respect to the second objection—first, the direction of the learned Judge does not leave to the jury the question of *fact*, whether there had been due notice of dishonor given to the defendant. It was the duty of the plaintiff's counsel to have called upon the Judge to leave that question to the jury, but they felt that, upon the evidence, the jury would find that question against the plaintiff; and, in truth, what they relied on was a waiver by the defendant of the

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(a) 2 Tyrw. 181.

(b) 7 East, 385.

(c) 2 Taunt. 61.

(d) 3 Taunt. 415.

(e) 6 M. &amp; S. 217.

(f) 3 Taunt. 115.

(g) 5 Taunt. 314.

(h) 13 East, 157.

(i) 2 Brod. &amp; Bing. 165.

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necessity of notice. Could the jury understand any thing else, by the Judge's charge, but that, in this case, if they believed the defendant considered himself liable *in point of law*, there was no occasion to prove notice of dishonor. But secondly, on the whole of the case, there was no evidence of notice to go to the jury.

Mr. *Holmes* and Mr. *Robert Andrews*, *contra*, were not called upon by the Court.

*Cur. adv. vult.*

WOULFE, C. B.—This case comes before the court upon a bill of exceptions, taken by the defendant's counsel, to the charge of the learned Judge who tried it.—[His Lordship, having read the declaration and the first exception, proceeded as follows :]—It was proved at the trial, that the bill, so declared on, was presented for payment, at "No. 20, "High-street, Newry," according to the special acceptance; considering that, as between the indorsee and the drawer and indorser, the special acceptance is not affected by the recent statute of the 1 and 2 G. 4. c. 78. The declaration contained no averment of a presentment at the place specified in the acceptance, and on that omission, the first exception is grounded. It is alleged that there is a variance between the bill, as stated, in the declaration, and the bill, as proved at the trial. With respect to this exception, the court feel no difficulty in overruling it. There is a recent case, in which, after mature consideration, the very point has been decided; I refer to the case of *Parks v. Edge* (a); that case is exactly in point with the present, and it is impossible to suggest any circumstance, by which it can be distinguished from it. It was there urged by the defendant's counsel, that the bill was accepted payable at No. 8, Cloak-lane, Cheapside; but that in the declaration there was no allegation that it was so accepted, nor was it alleged that any presentment was made at that place; and the case of *Gibb v. Mather* was referred to in support of this argument. But Baron Bayley, after inquiring, whether a presentment at the particular place was proved, observes:—"The allegation does not signify. You are not bound to state the acceptance, but only to prove such a presentment as the real acceptance required. In *Gibb v. Mather*, no presentment at the particular place was proved. In the ordinary action, you state that the bill was duly presented to J. S. You are not bound to state the particular place where it was presented." And in delivering his judgment, the same learned Baron says:—"As to the objection, that it was incumbent on the plaintiff to allege in his declaration a presentment at the particular place, No. 8, Cloak-lane; the plaintiff is bound to prove a presentment, but, the manner and place of presentment are matter of evidence.

(a) 1 C. & M. 42<sup>o</sup>.

"It is not necessary to state an acceptance, whether general or at a particular place, against any party except the acceptor; and therefore, a plaintiff who declares, without stating an acceptance by the drawee, cannot be bound to state on the record such a presentment as the real acceptance requires. It is merely matter of evidence, and the proof of the presentment, at the particular place pointed out by the drawee, is evidence of the general presentment alleged in the declaration." And, of the same opinion were the other Judges. On the authority of that case, we are bound to overrule this exception, even, if upon principle, we had any doubt; none, however, is entertained by the court. The other exception rests upon a different ground.—[His Lordship here read the second exception.]—It appears to the court, that the learned Judge, by his charge, gave the jury distinctly to understand, that, in general, where a defendant is sued as indorser of a bill of exchange, in order to make him liable, it must be proved that he has received notice of non-payment by the acceptor; but, that the learned Judge left it to the jury to say, whether, under the circumstances of the present case, the defendant had not dispensed with the necessity of that proof. We think this to be the substance and fair import of the charge, and are, therefore, of opinion, that the second exception ought also to be overruled.

Exceptions overruled.

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*Monday, November 19th.*

*Coram* RICHARDS, Baron.\*

### PRACTICE—EJECTMENT—CONSOLIDATION OF DEFENCES.

*Lessee* GREGORY and others *v.* ARCHER and others.

Application on behalf of the lessors of the plaintiff, that the defendants might be obliged to consolidate their defences, upon the terms offered by the notice, they having taken separate defences to the declaration in ejectment in this case. This was an ejectment on the title.

The motion was resisted by the defendants, upon the ground that the proper terms had not been offered (a). Defendants' counsel applied for the costs of the motion.

When separate defences have been taken to an ejectment, the court will order them to be consolidated upon terms.

(a) See *Lessee M'Cormick v. M'Alister* and others, 2 F. & S. 268, and note, *ibid.*

\* The Chief Baron, Pennefather, Baron, and Foster, Baron, were sitting in the Court of Error.

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RICHARDS, Baron.—The defendants are not entitled to the costs of the motion, as an appearance on their part was unnecessary, the Court having lately adopted a fixed form for the order in such cases.

Let the several defences taken by the defendants in this action be accordingly consolidated, upon the terms contained in that order.\*

\* The following is the form of the order referred to :—

|              |   |                                      |
|--------------|---|--------------------------------------|
| John Jack,   | } | " Upon motion of                     |
| Lessee of—,  |   | " Mr. ———, of                        |
| v.           |   | " counsel for the les-               |
| A. B.        |   | " sors of plaintiff, and             |
| _____        |   | " on reading the de-                 |
| Lessee same, | } | " claration in eject-                |
| v.           |   | " ment in this cause,                |
| C. D.        |   | " and the defendants'                |
| _____        |   | " several defences                   |
| Lessee same, |   | " thereto;—It is OR-                 |
| v.           |   | " DERED by the Court,                |
| E. F.        |   | " that the defences                  |
| _____        | } | " taken by the defen-                |
|              |   | " dants C. D. and E. F. be conso-    |
|              |   | " lidated with the defence taken     |
|              |   | " by the defendant A. B.; and that   |
|              |   | " said several defendants be at li-  |
|              |   | " berty to make separate defences    |
|              |   | " at the trial. It is FURTHER ORDER- |

" ED, that in case the lessor of the  
" plaintiff shall not obtain a verdict  
" for any part of the lands and pre-  
" mises, for which said defendants,  
" or any of them, have taken de-  
" fences, that then, such defendant  
" or defendants as shall be acquitted,  
" shall have his or their costs of the  
" trial:—*and that such consolida-*  
" *tion of defences shall be without*  
" *prejudice to each of said defend-*  
" *ants giving evidence, one for the*  
" *other, if otherwise, and independ-*  
" *ently of such consolidation, they*  
" *would have been admissible wit-*  
" *nesses in point of law, without*  
" *further motion.*"

¶ The concluding paragraph, printed in italics, is the addition made (for the first time) in *Lessee Earl of Bandon v. Ejector*, on the 14th of June, 1838."

### NEW RULE—PLEA OF NUL TIEL RECORD— DEMURRER—CERTIFICATE OF COUNSEL.

ORDER.

*Monday, 26th November, 1838.*

IT IS ORDERED, That from and after the first day of Hilary Term next, no Plea of *Nul Tiel Record*, or Demurrer, shall be received by the Officer, without the Certificate of Counsel, that in his opinion such Plea or Demurrer (as the case may be) is tenable.

By the Court,

(Signed)

STEPHEN WOULFE.

RICHARD PENNEFATHER.

J. LESLIE FOSTER.

JOHN RICHARDS.

QUEEN'S BENCH.—Mr. Justice Crampton sat alone in this Court, from the 14th to the 23d of November, both inclusive, the other Judges being engaged on these days in the Court of Error:

C A S E S  
IN THE COURTS OF  
QUEEN'S BENCH, COMMON PLEAS,  
AND EXCHEQUER.  
IN HILARY TERM, 1839.

QUEEN'S BENCH.

*Saturday, January 12th.*

PRACTICE—WRIT—SUBSTITUTION OF SERVICE.

ANONYMOUS.

Mr. GIBSON applied for an order to substitute service of the *capias ad respondendum* upon the defendant in this case. The affidavit of the process-server stated that, on the 19th of October last, he went to the house of the defendant, and saw his wife, who told him that her husband was then out, and that she did know where; went again, on the 25th, when he also saw the defendant's wife, who told him that her husband was not then at home; that, on the 30th of October, the day before the return of the writ, he went a third time to defendant's house, and saw his wife as before, when she gave the same account of the defendant, upon which he left a copy of the writ with her. On the 21st of December, the writ having been renewed, he again went to the defendant's house, and when he was going in, the persons inside appeared in great confusion, and one of them hurried a man, who answered to the description of the defendant, into a room, which was then closed and fastened in the inside upon him; that, on deponent's wishing to enter said room, he was told, by the father of the defendant, who resided with him in the same house, that he would not be allowed—that, thereupon, he served the father with the writ.

The court will order service of a writ of *capias ad respondendum* to be substituted, where there have been several ineffectual attempts made to serve the defendant, and where there are strong circumstances to lead to the belief that he was concealed in the house on one occasion when the process-server went to serve him.

The COURT inquired if the house at which the service of the writ was attempted was the dwelling-house of defendant; and, being answered in

P

the affirmative, directed that service should be substituted, by serving the defendant's father.

Motion granted.

*Saturday, January 12th, and Monday, January 14th, 1839.*

### COVENANT—LANDLORD AND TENANT.

NIXON v. DENHAM.

In covenant for suffering premises to be out of repair during the continuance of the term, it is no objection to a verdict, giving full damages for the injury which the property suffered, that the defendant was lessee in a lease of lives containing a covenant for perpetual renewal on the part of the lessor.

COVENANT for not keeping certain premises in repair.

The covenant was contained in a lease for three lives renewable for ever, dated the 8th of July, 1814. The defendant was lessee in this lease, and he had, for the consideration of £1000, assigned his interest to G. S. Hawthorne, by deed, dated 1836. The lease was made between G. Nixon, J. Faussett, and the defendant; and thereby, after reciting that G. Nixon had, on the 1st of December, 1807, demised the lands of Nixon Hall, &c., to the said J. Faussett, for three lives, with a covenant for perpetual renewal, at the rent of £291; that defendant had contracted to purchase said Faussett's interest for £2500; that Faussett should surrender his lease, and Nixon demise said lands, for a like term, and at same rent, and with like covenants. Said Nixon, in consideration of said surrender, demised to defendant said lands and premises for the three lives in the lease of 1807, with a covenant for perpetual renewal, on the part of the lessor *only*, &c. The declaration contained two counts: in the first, the plaintiff claimed as the survivor of the two co-heiresses-at-law of G. Nixon, the lessor; and in the second, as the survivor of the two co-devisees of the said G. Nixon. There was no evidence of the will of G. Nixon, and therefore, the plaintiff's title to damages was as surviving co-heiress. The breach, as stated in the first count of the declaration, was as follows:—"That after the making of the said indenture, and during the continuance of the said demise, and after the death of the said G. Nixon, and after the death of the plaintiff's co-heiress, the defendant did not, nor would not, uphold, support," &c.; "but, on the contrary, the defendant, after the making of the said indenture, and during the continuance of the demise, and after the death of G. Nixon, and after the death of said co-heiress, to wit, on the 1st of September, 1832, and from thence hitherto suffered, &c., the premises to be and continue ruinous and in decay, &c." The defendant pleaded four pleas, but upon the fourth plea alone any question arose; and it stated, "That during the continuance of the term, and after the death of the said G. Nixon, and after the death of the said co-heiress, the defendant did preserve, &c., said premises, &c., in

"good and sufficient repair, &c., according to the said covenant." The case came on for trial at the last Summer Assizes for the county of Fermanagh, before TORRENS, J. The title of the plaintiff was admitted, and that G. Nixon died in 1818, and plaintiff's sister and co-heiress died in the year 1832; and two architects proved the ruinous state of a dwelling-house and offices upon the premises, and stated the estimate for repairing the house at £1467, and for the offices at £835; and that the dilapidations must have been going on for twenty years. Other witnesses proved that Hawthorne used rooms in the dwelling-house for threshing, &c. For the defendant, some evidence was given, to shew that the house was in a bad state of repair when the defendant went into possession, and also, that he had expended money since in repairs. It was also proved that the last gale of rent that fell due had been paid, and that Hawthorne would not allow the defendant's witnesses to see the premises, in order to be able to give evidence at the trial.

Counsel for the defendant contended that, according to the structure of the pleadings, the plaintiff was not entitled to recover damages for any injury done prior to the death of the plaintiff's sister; and also, that the jury should be directed, that the proper criterion for estimating the damages was, the diminution which the plaintiff's security for rent during the term may have sustained, by reason of the defendant not keeping the premises in repair according to the covenant, and not the sum which it would cost to put the premises in repair. The learned Judge declined so to direct the jury, but took a note of both objections; subject whereto, the jury found a verdict for plaintiff, on the first count, for £1700. In Michaelmas Term, a conditional order was obtained to set aside this verdict, and for a new trial, upon the ground of misdirection, excessive damages, and surprise; and an affidavit of the defendant's was used upon the motion, stating the dilapidated state of the premises, when he got possession of them; the refusal of Hawthorne to permit his witnesses to view the premises previous to the trial; and also, that Hawthorne had served him with notices, threatening to sue him, if he did not expend the amount of the verdict upon the premises. There were also two affidavits by the witnesses produced upon the trial, corroborating the defendant, as to Hawthorne's refusing them permission to see the premises.

Against this conditional order,

Mr. *Major*, Q.C., with whom were Messrs. *Deering*, Q.C., and *Brooke*, Q.C., now shewed cause.—As to the objection to the verdict, on the ground of surprise, because the defendant's witnesses were not allowed to inspect the premises, it is not pretended that the plaintiff interfered to prevent them; and as to the other, that the damages are excessive, they are £600 less than the two architects swore would be

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required to repair the premises, and the Judge did not complain of the verdict. As to the objection, that the plaintiff was only entitled to damages for what occurred subsequent to the death of her co-heiress, all the evidence, on the part both of the plaintiff and defendant, covered the interval from the death of G. Nixon. The dilapidations were proved to have taken place within the time subsequent to his death, and if the pleadings allowed us to give that evidence, the verdict is right. As to the mode of estimating the damages, it is well settled that the proper criterion is, how much will it cost to put the premises in proper repair, at the time when action is brought; and this although action is brought during the continuance of the lease. *Vivian v. Champion* (a); *Luxmore v. Robson* (b).

Messrs. *Smith*, Q.C., and *Brewster*, Q.C., *contra*.—The verdict must be set aside, upon the grounds of excessive damages and misdirection of the Judge. There are two modes of estimating the damages in a case of this kind; one, when action is brought during the continuance of the lease; another, when brought after its termination; and this distinction is to be particularly observed in a lease of lives renewable for ever, which is a purchase. In a common case of a lease expired, what shall be indemnity to the landlord is not the invariable test, and never ought to be where the interest is, as in this case, a perpetuity. Suppose the case of a fee-farm grant, and the rent reserved merely nominal, the owner of the fee has £5 a-year out of the property, and the beneficial proprietor assigns his interest, would the owner in fee be entitled, as against his lessee, to recover the full value of the property injured? or would he only be entitled to damages for the amount of injury done to him, by diminishing the security he had for his rent? We contend that the plaintiff's claim to damages was not the amount of the injury done to the property, but the injury which he sustained thereby; and damage to the amount of £1700 may have been done to the property, and the plaintiff in this action not thereby injured to the amount of £1, and the Judge, in altogether excluding this view from the jury, was wrong.—[CRAMPTON, J. It would appear that it was the defendant's intention not to renew the lease.]—It would be very proper to submit that to the jury, to shew it was not a perpetuity; but it is no ground for excluding this view of the case altogether from the consideration of the jury. The conduct of Hawthorne, in refusing the defendant's witnesses liberty to inspect the premises, is another ground why the court should send this case for further inquiry. A verdict, had by such means, will not satisfy the court; and, from the whole of the case, it is clear that the plaintiff was acting in collusion with Hawthorne; and, if the court is satisfied of that fact alone, it will set aside this verdict.

(a) 1 Salk. 141; S. C. 2 Raym. 1125.

(b) 1 B. &amp; Al. 584.

CRAMPTON, J.—The case resolves itself into this, whether this is different from the case of an occupation lease.

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Mr. Deering, Q. C., replied.—Look at the lease; there is no covenant on the part of the lessee to renew. Two of the *cestue que vies* have died, and no renewal has been sought. We offered to forego the damages, if this lease was made a perpetual lease, and the rent secured, and we repeat that offer now. Is a landlord to be deprived of his other remedies, because he grants a perpetuity? This case is ruled by *Vivian v. Campion*; and the case of *Luxmore v. Robson* establishes the rule as to actions brought during the continuance of the term.

BUSHE, C. J.—The case of *Vivian v. Campion* has not been questioned; and if the present case cannot be distinguished from the case of an occupation lease, it must be governed by that case.

Cause allowed, without costs.

Monday, January, 14th.

#### PRACTICE—AFFIDAVIT—SCIRE FACIAS—JUDGMENT.

WIGMORE, Assignee of WIGMORE v. WIGMORE.

Mr. Deasy applied, on behalf of the assignee of a judgment, for liberty to issue a *scire facias* to revive the judgment against the cognusor. The affidavit of the assignee stated, that the judgment was entered in Hilary Term, 1816, for £400, and assigned to the plaintiff in 1837; that payments had been made from time to time, for and on account "of interest," and that the last payment on account thereof, was "made to deponent for and on account of the said defendant, in the "month of November last;" that the cognusor was still living, &c.

In an affidavit to ground a motion for liberty to issue a *scire facias* to revive a judgment, a statement that payments of interest were made "for and on account" of the cognusor, and not stating by whom they were made, is insufficient.

*Per Curiam*.—The affidavit does not state by whom the payments of interest were made, it must be amended to this respect.

Motion refused.

On the 18th of January, this application was renewed, the affidavit having been amended, by stating, that £6, for and on account of interest upon this judgment, was paid in November last, to the deponent, by the son of the defendant, and for and on account of the said defendant; when the court granted a conditional rule.

*Tuesday, January, 15th.*

**PRACTICE—SERVICE—SCIRE FACIAS.**

**HILL v. STAWELL.**

Service of a *scire facias* to revive a judgment need not be personal.

Service of this writ, by throwing it into the defendant's yard through an open on the gate, was deemed good service under the circumstances of this case.

In this case the court had, last term, pronounced an order for a *sci. fa.*, to revive an old judgment.

Mr. *O'way* now moved, that the service of the writ in this case might be deemed good service. It appeared from an affidavit of a process-server, that he went to the residence of the cognusor, to serve the writ; that he could obtain no entrance; that he saw a daughter of the cognusor standing in the window, and told her to open the door, that he might hand her the copy of the writ; that she paid no attention to him; that he went round the house and found it impossible to get in; that through an open in the door leading into the yard he put a copy of the writ; that near the house, he met a laboring boy, to whom he told that he had put a copy through the gate, and desired him to tell his master; that after he had gone a short way from the residence of cognusor, he was followed by a number of men; that he, apprehending violence, took refuge in the house of a man he knew; that one of the men who followed him came to the owner of the house where he was, and said he had served a writ at the residence of the cognusor and should be made to remember it, so as not to come again. Under these circumstances, the putting the copy of the writ through the door into the yard, should be deemed good service.—[CRAMPTON, J. Personal service of this writ was not necessary.]—No; but the present application is made to make sure that the service, such as it was, might be considered sufficient.

CRAMPTON, J.—Under the circumstances of the case, you may take the order.

Motion granted.

*Thursday, January 17th.*

**PRACTICE—RETAINING THE VENUE.**

**O'SHAUGHNESSY, Executrix of O'SHAUGHNESSY, v. LAMBERT and others.**

Where the venue was changed upon the usual affidavit, a motion to retain it, on the grounds of partiality in the jury, and that the defendants exercised undue influence upon the jurors, was refused.

This was a motion to retain the venue in the county of the city of Dublin, it having been changed to the county of Galway, upon the

usual affidavit. It was an action of trespass, for an excessive distress, and the plaintiff, who sued as administratrix of her deceased husband, filed an affidavit, stating that property, to the amount of £500, was seized and sold as for rent due by her testator, at a time when one penny was not due; that this was done for the purpose of harrassing and oppressing testator, because he voted contrary to the wishes of his landlord, one of the defendants, and solely from political animosity; that each of the defendants possessed great influence in the county, from their rank and property; and that, as many of their tenants would be likely to serve upon the jury, the plaintiff would not be safe in going to trial in that county. One of the defendants filed an affidavit, in which he stated that neither he nor any of the other defendants, as he believed, possessed any influence over their tenantry, or any of the inhabitants of the county Galway, which would induce them to act contrary to their duty as jurors. No plea had been filed to the declaration.

Mr. *Jennings*, in support of the motion, relied upon the allegations in the affidavit.

Mr. *Baker*, *contra*, objected, that this motion was premature, having been made before plea pleaded. Where the venue is sought to be changed upon the usual affidavit, the motion is properly made before plea pleaded; but where it is made upon special grounds, it must be after plea, *Weatherly v. Goring* (a); *Bohrs v. Sessions* (b); *Briscoe v. Roberts* (c); *Hill v. Payne* (d).—[CRAMPTON, J. I am not aware that this objection has been made on motion to retain the venue, but it has been often decided, in this court, on motion to change the venue upon special grounds.]—The reasoning of the Judges, in these cases, applies equally to a motion to retain, as to a motion to change the venue on special grounds.—[BUSHE, C. J. The alleged grounds in this case are partiality and undue influence; and we cannot tell how far these may be good grounds, until we know the issue to be tried.]—If the allegations be true, they disclose good grounds of challenge, and are therefore no ground for changing the venue.

Mr. *Jennings* replied, and relied upon the statement in the plaintiffs affidavit, that she could not have a fair trial in the county of Galway, and offered to try the case in any other county in the circuit.

BUSHE, C. J.—There is no foundation for this motion, and without

(a) 5 D. & R. 441; S. C. 3 B. & C. 552.

(c) 3 Dow. P. C. 434.

(b) 2 Dow. P. C. 699.

(d) 3 Dow. P. C. 695.

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deciding upon the objection made as to the time at which it has been brought forward, we refuse it with costs.

Motion refused with costs.

*Thursday, January 17th.*

### REPLEVIN—MOTION TO QUASH WRIT OF.

CORSCADEN v. STEWART.

A writ of replevin will not be quashed where it issued to get back goods which the defendant obtained by virtue of a contract to convey them over the sea for the plaintiff, there being questions of law, and questions of fact, which can be tried in the action.

**REPLEVIN.** On a former day, a conditional order had been obtained, on behalf of the captain of the Royal Adelaide, to quash a writ of replevin which issued out of the court of Chancery, or that the sheriffs of the city and county of Londonderry should assign the bail-bond to the defendant.

The affidavits in support of the conditional order stated, that the plaintiff proposed to Thomas Long, to charter from him and his partners the Royal Adelaide, to carry, from Liverpool, salt and coal to Philadelphia, part of said goods to be delivered at Londonderry, where they were to take in passengers, and that that proposal was accepted; that, on the 4th of June, three parts of the charter party were forwarded to the plaintiff, who returned two parts unexecuted, and retained one, which had been executed by the Longs; that, on the 17th June, she arrived at Derry, where the captain discharged the part of the cargo for that port; that plaintiff refused to freight the ship, alleging that she was not sea-worthy, which these deponents alleged was not true, the real cause being, that he had freighted another vessel on cheaper terms; that the captain was about to sail to Philadelphia, when the plaintiff, by letter, said he would send out the passengers, and, afterwards, having changed his mind, he refused, and demanded the goods, but did not tender the freight; that, on the 6th of July, a writ of replevin issued, by virtue of which the goods were taken; that after they were taken, the plaintiff tendered £68, for freight to Derry; that ship afterwards sailed to Quebec, and lost the profits of the outward voyage; that H. Crann, the plaintiff's agent in Liverpool, put the cargo on board; that the bills of lading were given to him, and that the plaintiff admitted he had received them.

The plaintiff, in his affidavit to shew cause, admitted the contract, and the allegations as to Crann's agency, and the arrival of the vessel; that a notice was served on Crann by Lloyd's agent at Liverpool, when 200 ton of salt was shipped, stating that the vessel was not sea-worthy, and that he should report same to committee at Lloyd's; that on the 6th of June he wrote to the Longs, informing them of this, and stating the

loss and inconvenience he would suffer by the passengers whom he had engaged to send out; admitted the reception of the charter-party, which he immediately returned; that he believed Long knew of notice from Lloyd's, when he forwarded the charter-party; that the emigrant agent at Derry gave him notice that he would not suffer passengers to sail to America by the Royal Adelaide; that that vessel cleared out of Liverpool for Derry, and not for Philadelphia; that the emigrant agent at Derry threatened, in the hearing of the captain, not to allow passengers to go to America, and that the captain threatened to carry the cargo to Philadelphia; that he was always ready to pay the freight, and denied that he wanted to get out of his contract with the Longs, or that his entering into any other contract was the cause of his refusing to charter the Royal Adelaide. H. Crann's affidavit confirmed the allegations about the interference of the agent of Lloyd's house, and stated, that when he first went on board, after the notice served on him about the vessel, he found the captain had stopped receiving the cargo, as Lloyd's agent had been on board, and he directed no more to be put on; that, afterwards, they took the goods on board at their own risk; that, on the 8th of June, he informed Long that the plaintiff gave up the charter party, and served notice, requiring them to give up the goods, or that they would be held responsible. They refused, and said they would go to Derry, and see there what was to be done; and that the vessel sailed on the 11th of June.

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Mr. Brewster, Q.C., with whom was Mr. Boyd, now shewed cause.—It is clear, from the affidavits, that part of the cargo was put on board against the will of the plaintiff's agent; and also, that the Longs took the entire responsibility of carrying the cargo upon themselves, and, at their own risk, brought to Londonderry. This writ lies to try the right of a party to stop goods *in transitu*, and when a fair legal question is to be tried, the court will not quash it. *Farrell v. Beresford* (a). In the case of *M'Carthy v. Maguire* (b), the court ordered the writ of replevin to be quashed; but, in that case, it appeared that the goods never were in the plaintiff's possession; but where there appears any contradiction as to the fact of the taking of the goods, the court will not decide the question on motion, but leave it to be tried by a jury. *Quin v. Dowling* (c). This writ is not confined to cases in which distresses are made, but it lies upon any taking—*Shannon v. Shannon* (d); and it will be issued in this country, in cases in which it does not lie in England. *Mansfield's Case* (e); *Anon.* (f); *Dunne v. Bergin* (g). Upon these authorities,

(a) 1 Ball & B. 328.

(c) 1 Mol. 48, note.

(e) 1 Mol. 28.

(b) 1 Mol. 17.

(d) 1 S. & Lef. 327.

(f) 1 Mol. 390.

(g) 1 Mol. 522.

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the plaintiff is entitled to this remedy, and the court will leave the action to be tried, and let the jury decide upon the contradictory statements in these affidavits.

Messrs. *Major*, Q. C., and Mr. *Whiteside*, *contra*.—The contract in this case is admitted, and that part, at least, of the goods, were delivered in pursuance of that contract, and replevin will lie in no case where the goods have gone into possession by virtue of a contract. *Shannon v. Shannon*. In *ex-parte Chamberlain* (a), the Lord Chancellor supposes a case precisely similar to the present, and says that he cannot see how a person, like the plaintiff here, could bring an action of replevin; and it was also distinctly ruled, that this writ does not lie where goods come into the possession of a party in the manner the defendant here obtained them. *Gallway v. Bird* (b). A contract was entered into, to carry the goods from Liverpool to Derry and Philadelphia; and if there was no disclaimer, there would be a *lien*, and the question of *lien* cannot be decided in replevin. There was no violent taking of the goods. The plaintiff's agent accepts the bills of lading; they are forwarded to the plaintiff, and the part of the cargo for Londonderry delivered there; and, upon these bills of lading, the party to whom they are assigned can maintain an action. The captain retained the goods for freight, and the money for freight from Liverpool to Londonderry was not tendered until the goods were forcibly taken away. Lloyd's Committee are a private company, and their agent could not, by any report, do away with a contract; and, as to the goods being put on board against the will of the plaintiff's agent, it is positively sworn that, after the vessel arrived at Derry, he proposed to send it forward with the passengers, and thereby waived any objection upon that ground. But there is nothing to shew that the goods were taken against the will of the plaintiff's agent; there is an endeavour, at most, to shift the responsibility from himself; but the real question in the case is, was the original taking unlawful; and, in this case, there is evidence that the contrary was the fact. The tender of £68, for the freight, after the taking, was a recognition of the original contract. *Mansfield's Case* is quite different from the present; the question of unlawful taking was apparent in that case. The writ does not lie upon another ground, namely, that the goods were carried beyond the seas. *Nightingale v. Adams* (c). The case of *McCarthy v. Maguire* is an authority in our favor; and the case of *Farrell v. Beresford* is distinguishable from the present; but, if it applies, its authority has been very much questioned, and no similar case is to be found in England.

(a) 1 S. &amp; Lef. 325.

(b) 12 Moo. 547; S. C. 4 Bing. 299.

(c) 1 Show. 91.

Mr. *Boyd* replied.—The arguments upon the other side would be applicable upon a bill of exceptions, and no case has been cited to shew what authority the court of Queen's Bench has to quash writs issuing out of the court of Chancery. The court will not quash a writ, unless for error apparent on face of the writ, *Oggyer v. Heywood* (a); *Woodcroft v. Kinaston* (b); *The Weavers' Company v. Hayward* (c). Where a writ issues improvidently the motion is to supersede the writ. *The Weavers' Company v. Hayward*. The question is not as stated, whether the original taking was unlawful, a detention of goods may be unlawful, although the original taking was lawful, and for such detention replevin will lie, *Archbold's Plead. and Evid.* 16; *Fitzherbert's N. B.* 69. G.; *Dore v. Wilkinson* (d), and every detention is a fresh taking, *Walton v. Kersop* (e). The question of lien is out of the case; the owner of the ship has no lien for the hire stipulated by charter-party for the voyage, on the goods shipped by the charterer, because the latter is the owner of the ship for the voyage, and the first owner has no possession of the ship or goods, without which there can be no lien, *Hutton v. Bragg* (f); *Newberry v. Colvin* (g). The lien for freight is always controlled by a written agreement, and in the present case there was a complete abandonment of the possession of the ship by the execution of the charter-party. It is the uniform practice of the courts, to allow the question which arises in this case, namely, the right to stop *in transitu* to be tried in an action of replevin. At this moment, that question is before the Common Pleas, in the case of *Roe v. Meade*; and it was so determined in *Farrell v. Beresford*. The courts are very reluctant to interfere in this summary way, but prefer leaving the defendant to his defence in the action, where he will have an opportunity of putting his objections upon the record, *Fenton v. Boyle* (h); *Pritchard v. Sterms* (i); *Wilson v. Weller* (k); *Tyndal v. Reade* (l); *Quin v. Dowling* (m); *Anon.* (n). The case of *Galloway v. Bird* was not argued, and in *ex parte Chamberlain*, Mr. Saurin states that the uniform practice was, to issue replevins in cases like the present. The contract was either rescinded in this case, or it was not: if it was rescinded, then there was a taking, which gives us a right to our replevin; and if the contract was not rescinded, we had the possession of the goods—[*Per Curiam*. Your proposition is, that the ship and cargo was in the possession of the plaintiff, by means of his servant the captain, therefore he could maintain an action in replevin. This is one view of

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(a) Amb. 59.

(c) 3 Atk. 362. q.

(e) 2 Wils. 354.

(g) 1 Bing 193; 6 Bl. P. C. 107.

(i) 6 T. R. 522.

(l) Sm. &amp; B. 375.

(b) 2 Atk. 316.

(d) 2 Stark. R. 287.

(f) 7 Taun. 14.

(h) 2 New R. 399.

(k) 2 Moo. 574.

(m) 1 Mol. 48.

(n) 2 Atk. 237.



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the case ; either there was a contract, or there was not ; and, if there was a contract, your proposition would hold].—As to the other part of the motion, the replevin bond is not assignable, unless an avowry or cognizance be pleaded, *Buller's N. P.* 60, *note* ; here they may plead "*non cepit*."

At the suggestion of the court, the case was postponed to allow the parties to agree upon some mode of trying the questions involved in the case ; and, on

*Thursday, the 17th of January,*

Mr. *Major Q. C.*, stated that no arrangement had been come to, but pressed the court to direct an issue to try the fact of the taking ; but—

*Per Curiam*.—That question will be raised in the action, and when there are important legal questions to be decided, and also controverted statements as to matters of fact, the court would not decide the case upon motion, but allow these questions of law and fact to be solemnly decided and put upon the record.

Cause shewn allowed, without costs.

*Saturday, January 26th.*

#### PRACTICE—SECURITY FOR COSTS—MARINER.

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A defendant, who is a seafaring man, will not be required to give security for costs in an action of replevin.

Mr. *BOYD* applied in this case for an order upon the defendant to give security for costs, and to stay his proceedings in the mean time. It was an action in replevin, and the declaration had been filed.

The affidavits used upon shewing cause against quashing the writ of replevin, as stated in the preceding case, were relied upon by both parties on the present motion ; and also a further affidavit, upon the part of the plaintiff, stating that the defendant was a seafaring man, and was in the habit of trading between the ports of Liverpool and Philadelphia, and that deponent believed the defendant resided in Glasgow. There was also an affidavit, on the part of the defendant, which stated that he was in the habit of trading between the ports of Liverpool, Greenock, Londonderry, and other ports in this country ; denied that he resided at Glasgow, but that he resided at the several ports at which he touched—if residence it could be called.

Mr. *Boyd*.—A defendant in replevin will be ordered to give security for costs, *Macnamara v. Booth* (a); *Selby v. Crutchley* (b). In the case of *Reddick v. Sinnott* (c), this motion was refused, upon the particular grounds that some of the defendants were resident within the jurisdiction. In *Lessee of Gilston v. Howard* (d), the authority of the case of *Selby v. Crutchley* is noticed by the court, and a distinction drawn between the case of an ejectment and an action of replevin.

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Mr. *Major, Q. C., contra*.—There is no case, but the case of *Selby v. Crutchley*, in which it has been ruled that a defendant in replevin will be required to give security for costs, and that was the case of a landlord resident out of the jurisdiction. This is very different from the present case, where there is the strongest evidence that the defendant got these goods by virtue of a contract entered into by the plaintiff. But there is an express decision the other way, in the case of *Heskett v. Biddle* (e). Upon another ground this motion must fail. The defendant is a seafaring man, and there are abundant authorities to shew that such a person will not be required to give this security. *Durrell v. Matheson* (f); *Nelson v. Ogle* (g); *Jacob v. Stevenson* (h); *Kasten v. Plaw* (i).

BURTON, J.—Have you any case, Mr. *Boyd*, where a mariner, like the defendant here, has been required to give security for costs?

Mr. *Boyd*.—I have got no case upon the point; but the cases cited are cases where the defendants were in the habit of trading backward and forward between the same two ports; here the defendant trades with several different ports, some of which are in America.

BUSHE, C. J., said the motion should be refused.

BURTON, J.—There are cases in which the defendant in replevin is in precisely the same position as a plaintiff in other actions; and there it may be quite right to require him to give this security, but that is not the case here.

PERRIN, J., concurred, and said that neither he nor his brethren quarrelled with the decision in *Selby v. Crutchley*; but where the plaintiff is the actor, as in this case, that authority is not applicable.

Motion refused, with costs.

(a) C. & Dix. 64.

(b) 1 Brod. & B. 505. S. C. 4 Moo. 180.

(c) 1 H. & Bro. 234.

(d) 2 Fox & S.

(e) 1 Hedges, 119.

(f) 8 Taun. 711.

(g) 2 Taun. 253.

(h) 1 Bos. & P. 96.

(i) 1 Moo. & P. 30.

*Tuesday, January 22d.*

**CERTIORARI—CONVICTION BEFORE MAGISTRATES—  
PENALTIES.**

**The QUEEN v. HARTE.**

Where upon the return of a conviction under the excise laws, to the Quarter Sessions, the Magistrate before whom the information was exhibited was described in it as *Honorable H. W.* and in the conviction as *H. W. Esq.*; *Held*, that this was not a fatal variance.

Where the act under which the defendant was convicted required that a notice in writing should be served upon him *within a week* after the information was exhibited, and the conviction stated that due notice in writing was served upon him, and also that the notice was produced and proved before the Magistrates; *Held*, that this statement was sufficient.

In Trinity Term, on motion of Mr. *Tomb*, Q. C., the matter of the return to the *certiorari* in this case was ordered to be set down for argument. It appeared from the return to the *certiorari* that a conviction was returned to the Quarter Sessions held at Graces', Oldcastle, Kilkenny, bearing date the 18th of July, 1837, under the hands and seals of James Esmonde and Robert Stubber, Esqrs., setting forth that an information was exhibited by J. W. Price, an officer of excise, before *Henry Walker, Esq.*, justice of the peace, &c. The return then stated, that the defendant, who was a maltster, having received *due notice in writing* of the said information having been exhibited, &c., appeared before the said magistrates, and was convicted of an offence against the excise laws, for fraudulently concealing and conveying away from sight of the officer, a quantity of corn making into malt, and adjudged to have forfeited £200, which penalty they reduced to £50; that the notice was produced, and service of it upon the defendant proved; that the defendant appealed to the Quarter Sessions; that to this conviction there was attached an information, exhibited on the 4th of July, 1837, by one T. W. Price, an officer of excise, against the said defendant, before the *Honorable Henry Walker*, justice of the peace, &c.; and that because the conviction stated that the information was laid before *Henry Walker, Esq.*, justice of the peace, and it did not appear that there was any such justice of the peace, &c., or any other information laid before *Henry Walker, Esq.*, before, or at the time of pronouncing the judgment in said conviction mentioned, that therefore the proceedings and conviction were *coram non judice* and void, and that the Barrister and Justices on this objection, and for want of a sufficient information, allowed the appeal of the defendant and reversed the conviction.

Mr. *Tomb*, Q. C., in support of the conviction, stated the objection as to the description of Mr. Walker, and contended that it was no ground for reversing the conviction, it being at most a technical objection which the Magistrates are bound to correct by the 7 & 8 G. 4. c. 53, s. 73.

Mr. *Maley*, for the defendant.—By the return it does not appear that an information was ever exhibited before Henry Walker, Esq., which is necessary to support the conviction. As to this being a technical description, it has been frequently held that the description of the Magis-

trates must be accurately stated, *Rex v. Johnson* (a). Modern authorities have gone very far in holding that the misdescription of a name of dignity is fatal, *Walters v. Mace* (b); and in *O'Brien v. Whitlop* (c), Mr. Justice JEBB, in his judgment, says, "the description is part of the "name, it makes him a different person." There is another ground upon which this conviction is bad upon the face of it. By 4 & 5 W. 4, c. 51, s. 19, a notice in writing must be given to the person against whom an information shall be exhibited, within one week after the exhibition of such information. The conviction should set out this notice, or at least should have stated that such notice was given within a week after the information was exhibited, *Rex v. Croke* (d). The terms of the act requiring the notice, in the present case, are more precise than those of the act under which this decision was pronounced. The notice was necessary to give the Magistrates jurisdiction, and if it was not given the information was a nullity; and if the Magistrates had no jurisdiction the court of Quarter Sessions had none.

*Per Curiam.*—It appears, upon the face of the record, that the notice in this case was produced before the Magistrates, and proved. Your objection would go to this, that the Magistrates should have set out a copy of the notice; but there is nothing in this objection. The only question is upon the variance in the description of the Magistrate in the information, and the conviction; and, upon that point also, the decision at the Quarter Sessions appears to me to have been wrong. There is no inconsistency between the titles of Honorable and Esquire; the former is given by courtesy, the latter being, perhaps, the more correct description. But it is, at all events, a technical error, which the Magistrates were bound to correct, under the statute referred to by Mr. *Tomb*. The case must, therefore, go back to the Quarter Sessions, to be adjudicated upon.

Objections overruled.

(a) 1 Str. 251.

(c) 2 L. R. N. S. 144.

(b) 1 B. & A. 756.

(d) Cow. 30.

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*Wednesday, January 23d.***PRACTICE—SERVICE OF SUMMONS IN EJECTMENT.****Lord TALBOT DE MALAHIDE v. the Casual Ejector.**

Service of the summons in ejectment, by serving the brother of the defendants, deemed good service, under the circumstances.

Mr. RADCLIFFE applied for liberty to substitute service of the summons in ejectment, in this case, on William, Charlotte, and Ellen Beasley, who claimed an interest in these lands, under their father's will, or that the service already made might be deemed good service. The affidavits to ground the motion stated, that the process-server served these parties, by leaving with John Beasley, the brother of these defendants, who was also served as a defendant himself, three copies of the summons in ejectment; that he made inquiries from the tenants of the lands about the residences of these persons, and that they all referred him, for information on the subject, to the said John Beasley; that upon asking him, he stated, that his brother William would be in town next day, and that he would inform him that ejectments were served; that the said J. Beasley, upon being pressed to tell him where his said sisters lived, answered, that one of them lived outside the town of Drogheda, and that the other resided in the county of Longford, and refused to tell more particularly where they resided, but stated that they would hear of the proceedings by ejectment; that deponent has been unable to discover the residences of these defendants, or of their husbands, although he used all due diligence for that purpose; that the said John Beasley receives the rents of said premises, and pays same, as deponent has heard and believes, as their agent or otherwise, to his said brother and sisters; and that deponent believes, conceals the residences of these defendants, for the purpose of throwing difficulties in the way of the plaintiff.

*Per Curiam.*—Let the service upon John Beasley be deemed good service upon these defendants, the plaintiff serving this order upon the defendant John Beasley.

Motion granted.

## COMMON PLEAS.

*Thursday, January 17th.*PRACTICE—JUDGMENT AS IN CASE OF A NON-SUIT—  
CONDITIONAL ORDER—COSTS.

CAREY v. WILLIAMS.

Mr. *H. Cooper*, Q. C.—To shew cause against the conditional order obtained by the defendant to enter up judgment as in case of a non-suit. On the 22d of November last, the defendant served notice of a motion to enter up judgment as in case of a non-suit; on the 23d, the plaintiff served a notice undertaking to go to trial; on the 3d of January, the plaintiff served notice of trial for the 12th of January; the plaintiff on the 10th of January withdrew notice of trial, and on the 11th, the defendant served the conditional order obtained on the 25th of November. The plaintiff then gave fresh notice of trial for the 21st of January. The undertaking which we served put an end to the notice of the 22d of November, and the conditional order obtained on that notice.

The Exchequer in England was the only court that gave costs to the defendant on applications to enter up judgment in case of a nonsuit, but that practice was found to be attended with much inconvenience to plaintiffs, and the court of Exchequer altered the practice and refused a motion like the present with costs (a).

Where a party obtains a conditional order for judgment as in case of a non-suit and does not make it absolute, the court will not allow him to do so after an undertaking and after notice of trial served although that notice be withdrawn.

Mr. *Culligan*, on behalf of the defendant, submitted that he was entitled to the costs of the former application, and the costs of the day, when the plaintiff did not proceed to trial, pursuant to his undertaking. The defendant never acted on the conditional order, he obtained on the 15th November, till the plaintiff made default on the 10th of January; he then served the conditional order after they withdrew their notice of trial and not till then. They could not tell but the plaintiff would also withdraw the notice of trial now served, and submitted, that on these grounds, a nupon the authority of the case of *O'Donohoe v. O'Donohoe* (b) decided in the Queen's Bench last Term, that the defendant was entitled to the costs already incurred, and the costs of this motion, and that if the plaintiff did not go to trial, the defendant should have judgment without a further application.

TORRENS, J.—The plaintiff has satisfied the conditional order by his

(a) 13 Prin. 666.

(b) 3 Series Law Rec. or Irish Rep. vol. 1, p. 9, 10.

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undertaking, and notice of trial. You have slept on that order and you cannot now avail yourself of it.

DOHERTY, Chief Justice.—By your own conduct you have deprived yourself of the benefit of the conditional order. Your course should have been either to have applied for a new conditional order, or to have put a rule on the plaintiff to stop till he paid the costs of the former notice of trial; the defendant has been prevented by a fatality (in not proceeding on his conditional order), from obtaining the costs of the former motion, and the present, for if he had come in then, he would have stopped the plaintiff's proceedings till he had paid the former costs. That being the case, we will not give either party the costs of this, or the former motion.

Order.—Allow the cause shewn without costs; plaintiff undertaking to go to trial on the next *nisi prius* day.

Monday, January 28th.

#### PRACTICE—CHANGE OF VENUE—BILL OF EXCHANGE.

HARNETT v. TORRENS.

The court will not change the venue in an action on a bill of exchange, although the defendant swears that he himself, and all his witnesses reside in the county to which it is sought to be changed.

Mr. SPROULE applied, on behalf of the defendant, to change the venue from the city of Dublin to the county of the city of Londonderry. This was an action on a bill of exchange, by the indorsee, against the defendant, as the alleged acceptor of the bill of exchange. He swears, positively, that he never accepted the bill; that he never authorised any one to accept it for him; that he never heard of it till he was arrested in Londonderry, on *capias* issued out of this court on foot of the bill; that he has resided all his life in Derry; that he hopes to be able to prove, on the trial, by several witnesses, who all reside in Derry, that the acceptance is not his handwriting. He also swears, that the whole cause of action, if any, arose in the county of the city of Londonderry, and not elsewhere out of the county. We have offered them judgment, as of this term, if there shall be a verdict against defendant, and immediate execution. We have pleaded issuably, and have offered all the terms and every advantage which they could have by a trial in the city of Dublin, and the defendant swears it is not for delay.

Mr. M'Donnell, Q. C., for plaintiff.—This application is contrary to the spirit of an order made in this court, this Term, whereby the defend-

ant was let in on the terms of pleading issuably, and taking short notice of trial ; besides, on all the authorities, this affidavit is not sufficient to induce the court to relax the rule as to the venue on bills of exchange; there is not sufficient ground stated in this affidavit ; it is not enough to state, that he, the defendant, has resided in Derry, and that all *his* witnesses reside there ; he has not mentioned how many witnesses he has, and nothing is said in the affidavit as to the plaintiff's witnesses. This case is very similar to the case of *Flecke v. Godfrey (a)*. In that case Lord Mansfield said, that the venue in such actions could not be changed, unless some special ground was laid, and though it might be convenient to the defendant to try the case in Suffolk, it was equally convenient to the plaintiff to try it in Yorkshire, where he had laid his venue, as he had a right to do. Upon these grounds, he submitted that the venue should be retained.

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DOHERTY, Chief Justice.—No sufficient affidavit has been made to take this case out of the general rule, and this court will be slow to grant a motion like the present, unless some very special and cogent grounds for doing so be stated in the affidavits.

*Per Curiam*—No rule.

(a) 1 Term Rep. 782, n.

Monday, January 28th.

## PRACTICE—EJECTMENT ON THE TITLE—AMENDMENT.

Lessee CARROLL v. EJECTOR.

Mr. *Peebles* applied, on behalf of the lessor of the plaintiff, for liberty to amend the declaration in ejectment in this case, by substituting December, 1837 as the date of the demise, instead of December, 1833, without prejudice to the rules already served. The ejectment had been moved on the rules taken out, but no defence had been as yet taken ; that it was a clerical mistake, the title of the plaintiff not having accrued till the year 1837 ; the demise could not be laid previous to that year ; that this case came within the usual rule laid down as to amendments ; that when there has been no appearance, nor any defence taken, the plaintiff was entitled to amend ; that no possible inconvenience could arise from correcting a mistake like the present.

The court will allow the plaintiff to amend his declaration in an ejectment on the title where no defence has been taken without prejudice to the rules entered on the 2d declaration.

*Per Curiam*—Take the order.



## EXCHEQUER OF PLEAS.

*Monday, November 26th.*

## PRACTICE—SEQUESTRATOR—ACCOUNT.

EDWARD WALDRON *v.* The Rev. JOHN GARRETT.

The court treats a sequestrator as its officer, and as such, it will make him account before it on a summary application.

Mr. CAREY moved that it should be referred to the proper officer to take an account of the funds received by Frederick Stock, the sequestrator, or which, without wilful default, he might have received, and of the payments and credits to which he was entitled, &c.

Mr. *Walter Bourke*, on the part of the sequestrator, opposed the motion. The court has no jurisdiction to grant the present application. The sequestrator is, strictly, the Bishop's officer; and although the Bishop in this case is dead, his representatives are liable to account before the court, and it is for them, afterwards, to deal with the sequestrator, *Darby v. L'Estrange* (a).—[PENNEFATHER, B. The Bishop is, certainly, in sequestrations, the officer of the court, and the sequestrator the officer of the Bishop; but the sequestrator is likewise the officer of the court. This creditor has, clearly, a right as against him for an account.]—If a creditor sought to make a sheriff account he should not apply against his bailiff.—[RICHARDS, B. He might apply against the sub-sheriff.]—The sub-sheriff is a recognised officer of the court. If this application were granted, a sequestrator might refuse to account to the Bishop, or be responsible to him, upon the plea that he was an officer of the court, and responsible to it. Here the creditor will suffer no loss or hardship, for he can file a bill against the sequestrator. That the Bishop is the person against whom the application should be made is established by a number of cases, *Walwyn v. Auberry*, (b); *Marsh v. Fawcett*, (c); *Lanquit v. Jones*, (d); *Pichard v. Paiton*, (e); *King v. The Bishop of London*, (f).

*Per Curiam.* We think this application should be granted. It is according to the course and practice of the court to give the creditor this summary relief. The sequestration is a common-law proceeding, somewhat in the nature of a *feri facias*. The sequestrator, although put in by the Bishop, is really the person to account, the Bishop being little more than a nominal party. In the case of sheriffs, we oblige the sub-sheriff, and even the returning officer, where he has received money, to account, without, however, absolving the sheriff. The case of *Darby v. L'Estrange* does not establish the position for which it has been cited.

Motion granted.

(a) *Batty*, 472. (b) 1 Mod. 258. S. C., 2 Mod. 254. (c) 2 H. Blac. 582.  
(d) *Str.* 87. (e) 1 Sid. 276. (f) 1 D. & R. 486.

*Sittings after Michaelmas Term.*

## REGISTRY APPEALS.

*Monday, December 31st.*REGISTERING ANEW under the 27th sec. of the REFORM ACT,  
2 & 3 W. 4, c. 88.—CERTIFICATE.*In re SETON.**In re M'CLELAND.*

These cases came on this day, to be heard before the Lord CHIEF BARON, by way of appeal from the decision of Mr. *Dobbs*, the Registering Barrister for the city of Dublin, who rejected the claims of the appellants to register anew under the 27th section of the Reform Act, the 2 & 3 W. 4, c. 88. The grounds upon which the claimants were rejected by the Barrister are stated in the respective orders of rejection, which were as follows:—

*Order of Rejection in Alexander Seton's case.*—"Alexander Seton, Esq., having given notice to register anew, under the provisions of the statute of the 2 & 3 W. 4, c. 88, as a twenty pound leaseholder, claimant produced a certificate of registry as a ten pound leaseholder, bearing date the 30th day of October, 1832, and demanded a new certificate of registry, upon the production of the former certificate, without giving any further proof of his qualification, or answering any question upon oath, or making or subscribing any new affidavit of registry. I was of opinion that claimant was not entitled to a new certificate, under the circumstances above stated, and rejected him. N. B. The practice of the court is, in cases of original registry, to allow a claimant to register as a ten pound leaseholder, although he gave notice as a twenty pound leaseholder, but not *vice versa*."

"CONWAY E. DOBBS."

*Order of Rejection in Robert M'Clelland's case.*—"Robert M'Clelland, Esq., having given notice to register anew under the provisions of the statute of the 2 & 3 W. 4, c. 88, Alexander Seton, Esq., produced to me a certificate of registry of R. M'Clelland, bearing date the 24th day of October, 1832, and stated, that the said Robert M'Clelland was alive, and authorised him to demand a new certificate of registry for

The bare production of his former certificate by a party seeking to register anew under the 27th section of the Reform Act (2 & 3 W. 4, c. 88,) without any examination upon oath, amounts to *prima facie* evidence of his right.

Any person qualified under the 18th section to oppose a claim of original registry, may oppose a claim of renewal of registry; and insist that the person producing a certificate, whether he be the claimant himself or his agent, shall submit to examination.

In such cases of registry anew, no affidavit need be made by the claimant.

When a claimant has been rejected by the barrister for any other cause than insufficiency of value, the duty of the appellate court is, not to hear the case *de novo*, but merely to examine and decide upon the validity of the cause assigned.

A claimant seeking to register anew under the 27th sec. of the 2 & 3 W. 4, c. 88, may cause his certificate to be produced by an agent, without his necessarily appearing in person.

The bare production of such certificate by a third party, is evidence of agency, and entitles him to claim a new certificate without any examination on oath, unless such examination be required by some person qualified to oppose a claim of registry.

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"him without his personally demanding same, or giving any further  
"proof of his qualification, or answering any question upon oath, or  
"making or subscribing any new affidavit of registry. I was of opinion  
"that claimant was not entitled to a new certificate of registry under  
"the above circumstances, and rejected him.

"CONWAY E. DOBBS."\*

Mr. *Richard Moore*, Q. C., appeared as counsel for the appellant, Richard M'Cleland. The facts of this case are very few. Mr. M'Cleland is a householder of the city of Dublin, and at the general registry sessions which were held in October, 1832, (being the first under the Reform Act,) he applied to be registered as a householder, and on the 14th of October, 1832, obtained his certificate in the form prescribed by the act of parliament declaring him to be duly registered. As the registry lasts for a period of 8 years only, M'Cleland being desirous to renew his registry, on the 10th of October last, served a notice that he would apply to be registered anew, under the provisions of the Reform Act. He did not attend in person before the Registering Barrister pursuant to said notice, but gave his certificate to Mr. A. Seton, a highly respectable barrister, who produced it, and demanded a new certificate on the part of M'Cleland. The Registering Barrister, however, rejected him upon the grounds stated in the order.—[The learned gentleman here read the order of rejection in M'Cleland's case.]—The questions raised on the appeal are of great public importance, involving, as they do, the rights and privileges of persons, who, having been once registered, seek to be registered anew, and, as the decision of the court on this appeal will govern the decisions of the Assistant Barristers throughout Ireland.

Mr. Sergeant *Jackson* here suggested, that the more regular course would be for Mr. *Moore* to state the facts of his client's case, and support it by evidence, before he proceeded to argue on the legal questions which would arise from the evidence.

Mr. *Moore* submitted that such was not the proper course. He had read the barrister's objections to allow his client to register, and he thought the first matter to be shewn, was that he ought not to have been rejected on the grounds stated in the order.

The CHIEF BARON.—I do not think that I am called on to investigate the case *de novo*. I am only to decide on the validity of the grounds upon which the Registering Barrister has rejected these

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\* In the course of the argument, minutely, the principal question in both cases were discussed indiscriminately, each being the same.

persons, and to examine the sufficiency or insufficiency of the order made by the court below.

Mr. Moore then resumed his argument.—Two questions arise on the construction of the Reform Act, and are to be decided on the present appeal:—first, whether a person who has been once registered, and who has obtained his certificate, should personally attend for the purpose of registering his vote. Or, whether the production of the certificate by a third person authorised by him is sufficient, without the personal attendance of the claimant? And, secondly, whether, supposing a personal attendance to be necessary, the claimant is, in the first instance, bound to give any further proof of his qualification, or subscribe any new affidavit of registry? I contend, that personal attendance is not necessary; and also, that the production of the certificate, whether by the client himself, or by a person authorised by him, is sufficient to establish a *prima facie* case to be re-registered, and entitles him to a new certificate, unless something sufficient shall appear in opposition to his claim. These two propositions contain the questions which are now to be argued. The Reform Act will be found to provide for three classes of persons. The first class consists of those, who had never been registered before the passing of that act; the 15th and 16th, and following sections are applicable to this class. The second class consists of those, who had been already registered under the 10 G. 4, c. 8. To this class the 22d section applies. The third class consists of those, who had once registered under the Reform Act, but who were desirous to register anew, in order to preserve the right of voting, which lasted only for eight years after registering. To the last mentioned class, the concluding portion of the 27th section applies.\*

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\* The 27th section of the Reform Act is as follows:—

“s. 27. And be it enacted, that  
“after the determination of the ses-  
“sion hereby directed to be first  
“holden for the registry of voters  
“for counties, cities, towns, and  
“boroughs, it shall be lawful for  
“any person claiming a right so to  
“be registered, to apply for that  
“purpose at any sessions of the  
“peace or adjournment thereof to  
“be held by and before the assist-  
“ant barrister or chairman of the  
“proper county, and by and before  
“the assistant barrister or chair-  
“man by the said schedule (A.) to

“this act annexed authorised to  
“register voters for such city, town,  
“or borough, upon giving to the  
“clerk of the peace a notice of his  
“intention so to do, in the form  
“herein provided, twenty clear  
“days at the least before the day  
“appointed for the holding of such  
“general or quarter session, and if  
“within a county at large, in the  
“division within which the freehold  
“or leasehold interest intended to  
“be registered shall be situate;  
“and the clerk of the peace or his  
“deputy shall in such case proceed

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Let us first take the case of a party attending in person, and the question that naturally arises is, what is he bound to do, and what are his rights? Nothing can be clearer or more explicit than the words of the act with regard to the third class; the words are, "without further proof or oath." That means, 'as I apprehend, that evidence is not required to be given, nor any further affidavit to be made. In the former part of the section, which provides for persons registering for the first time at a future sessions, the words are, "the like oaths taken," &c.; but in the concluding part of the section, providing for the case of a re-registry, the act says, "that the claimant shall be entitled and admitted "without further proof or oath;" thereby, as I contend, manifestly taking a distinction between those persons who seek to register for the first time, and those who seek to re-register. The 22d section, which relates to those already registered under the 10 G. 4, c. 8, also uses the words, "without further proof or oath;" thereby, as I contend, dispensing, in both cases, with any further proof of qualification, or oath of registering. The 23d section strongly bears out the construction now contended for. Before the passing of the Reform Act, 40s. freeholders and £5 householders had the privilege of voting in counties of cities and counties of towns; and when the Reform Act came to regulate that class of voters, it preserved their pri-

"in all respects in the same manner as hereinbefore prescribed with relation to applications for registering voters at the first session for that purpose, hereby directed; and the assistant barrister of such county, or chairman is hereby authorised and required to hear and determine such applications at such general or quarter sessions, and at the commencement of such sessions, and before any other business, civil or criminal, in the same manner in all respects as is hereinbefore provided with respect to applications to register at the sessions for that purpose to be first holden under this act; and thereupon the same proceedings shall and may be had, the like orders made, the like oaths taken, the like certificates granted, the like rights and powers of appeal enjoyed and exercised, and the like rules and regulations, enactments and things, observed, performed, and follow-

"ed, as if such application had been made at the first session for registering votes directed to be held under this act; PROVIDED always, that a certificate of a former registry under this act shall be deemed and taken to be *prima facie* evidence of the right of voting; and that any person, having given notice of his intention to register anew under this act, shall upon producing or causing to be produced such former certificate at the sessions for that purpose to be held, be entitled and admitted to register his vote, and to obtain a new certificate under this act, without further proof or oath, unless cause to the contrary shall appear, and shall by virtue of such new certificate be entitled to vote at any election or elections to be held within eight years next after the obtaining of such new certificate."

privileges, but expressly provided, that when they came to register, they should apply in person, and produce evidence in support of their claims. This proviso, as to 40s. freeholders and £5 householders, appears to me strongly to demonstrate, that the legislature intended to make a distinction between that class of voters, and those of a higher class, mentioned in the 22d and 27th sections. I conceive that the meaning of the legislature manifestly was, that, with the above exception, all those who had already undergone the ordeal of inquiry, and established their claims to vote, should be spared the inconvenience of again establishing their claims by evidence or oath, unless cause to the contrary should be shown by some person who opposed them. Of course, I admit that if any thing appeared, on opposition, calculated to excite a doubt in the mind of the Registering Barrister, the claimant would be bound to remove that doubt; but, until such doubt is raised, the production of the certificate establishes his *prima facie* case to be registered anew. The second question, then, is, whether it is necessary for the claimant to appear in person? The language of the act is, "upon producing, or *causing to be produced*, such former certificate," &c. It is impossible to contend that these two expressions mean the same thing. The act contemplates two distinct and separate cases. One case is, where the party attends in person, and produces his certificate; the other, where the party does not attend, but uses the agency of another, and, in the language of the act, "causes his certificate to be produced." In the latter case, the legislature manifestly meant something distinct from the attendance of the party himself. It is not to be supposed that these words were introduced unadvisedly; nor can they be rejected. The court will, therefore, give effect to them, unless there be something in the act to prevent it. There is nothing, however, in the act, to shew that the party who "causes his certificate to be produced," is not to have the same privileges as the party who himself produces it in person. If it is once established that the certificate makes out for the claimant a *prima facie* case, it is as effectually done by its production by another as by the party himself. This view is much strengthened by the 15th section, which relates to the notices of registry. That section enacts, that every person intending to apply to be registered shall "give, or *cause to be given*, &c., a notice," &c., of such his intention; thus clearly making it optional with the party to give the notice himself, or *cause it to be given* by another; and, in practice, it is well known that the notice is rarely given by the claimant in person. Why should the words, "cause to be given," receive a different construction in different sections? By the 23d section, 40s. freeholders and £5 householders are required to appear in person; and the language of that section demonstrates, that the legislature did not think fit to entrust that minor class of voters with those privileges with which,

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by the 22d section, it had entrusted the superior classes, who had already undergone the ordeal before the proper tribunal.—[CHIEF BARON. The 23d section not only requires the class of persons therein mentioned to apply in person, but it also requires them to give proof of their identity.]—The privilege of causing the certificate to be produced by another, is, after all, but a reasonable one; for, what is the advantage to be derived from persons who have already established their claim appearing before the Registering Barrister in person? This view is further borne out by the 46th section, which enacts, that £50 freeholders and clergymen may register their votes before one of the Judges of the superior courts; and they are entitled to be registered by the transmission of the certificate to the quarter sessions of the county where the freehold is situated. Here, a privilege was conferred by the legislature on a certain class of persons, by dispensing with the necessity of a personal attendance at the sessions, because, either from their rank in life, or from the extent of their qualification, it was conceived unnecessary to subject them to the inconvenience of attending before the Registering Barrister. This view will be made still stronger by a reference to the corresponding statute (the English Reform Act), the 1 & 2 W. 4, c. 45. The machinery in England for procuring a constituency is very different from that in Ireland. There, a yearly revision of the lists takes place; a party, not already registered, is obliged to come and substantiate his claim; but, when once his name is on the lists, it remains there for ever; nor is it necessary for him to do any thing more, unless his name be struck out by the overseer, or notice be served on him, that his qualification is disputed. It is therefore submitted, that the Registering Barrister is wrong in the view he has taken of this provision of the Reform Act. If M'Clelland had attended, he would not have been bound to make or subscribe any new oaths; and although he has not thought proper to attend, he is, nevertheless, entitled, on the production of his former certificate by an authorised person, to a new certificate of registry.

Mr. Sergeant Jackson, (with whom were Messrs *T.B.C. Smith*, Q.C., *Hayes*, and *Butt*), *contra*.

The present is certainly a case of great importance, as it is one which affects the entire body of the existing constituency of Ireland.

The proposition contended for by the appellant, in M'Clelland's case is, that if any man produce to the Registering Barrister a certificate of the registry of another, he is entitled to demand and to receive a new certificate of registry, in the name and on behalf of that other, without being sworn or offering any evidence.—[CHIEF BARON. Mr. Seton is a Barrister.]—He is, but that can make no distinction.—[CHIEF BARON. There is a class of persons to whom, as Barristers,

the court is usually disposed to give credence. I think, however, I am bound in this case to consider the question generally, and to look upon the person producing the certificate, not as a Barrister, but as an agent *pro hac vice*.]—The consequences of the court holding otherwise would be very dangerous, as other Judges might think themselves at liberty to receive the unsworn statement of persons, whether Barristers or not, and the certificates of dead men might thus be produced, by persons who were altogether unworthy of credit.

The question, both in M'Clelland's and in Seton's case, arises upon the 27th sec. of the Reform Act. The claimants contend, that having been already registered, under that Act, they are entitled to obtain a new certificate, upon merely producing or sending the former certificate, that is, without making the affidavit of registry, prescribed in the schedule to the act, or offering any other evidence, (unless cause to the contrary shall appear), and without attending in person. The question resolves itself into this,—what is the meaning of the words, “to register” his vote? We say it is, “to make and subscribe, in open court, an affidavit of registry,” which is to be placed amongst the records of the county. That this is the meaning of the phrase will be manifest, by a reference to the several acts passed, as to the registering of votes. If this be so, the advantage derived by the holders of old certificates is this:—by the 27th section of the Reform Act, they shall be admitted to register,—i.e. to make the affidavit of registry, without giving any evidence, or making any oath to prove their right to be registered; and having done so, they will be entitled to get a new certificate.

It is plain, that the affidavit of registry is no part of the proof on which the claimant is registered. By the provisions of the 16th, 17th, and 19th sections of the Reform Act, the claimant must satisfy the Barrister by his own oath, and, if necessary, by other proof, that he is entitled to register; and, when declared entitled by the Barrister, he is then, and not until then, admitted to make the affidavit. No preliminary evidence of right can dispense with the affidavit. In cases of rejection an appeal given, by the 24th, 25th, and 26th sections, to a Judge and jury, and after a decision in his favor, the appellant is admitted to make the affidavit. Hence it appears, that making and subscribing the affidavit, (being an act which the claimant is not allowed to perform, until he has first clearly made out his right to register, and being an act which he *must* perform after the highest adjudication upon his right,) is an essential and integral part of the act of registry. When he is declared entitled to register, it is, in other words, entitled to make and sign the affidavit which is to be deposited amongst the records of the county. At common law registry was unnecessary. By the 1 G. 2, c. 9, (repealed by the 19 G. 2, c. 11), no freeholder under £10 was entitled to vote, unless a memorial of the deed had been entered, six months

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before the election, with the Clerk of the Peace. By the 19 *G. 2*, c. 11, an affidavit was substituted for this unsworn memorial. By the 35 *G. 3*, c. 29, the former Registry Acts were repealed; but by sec. 31, it is enacted, that no person shall be admitted to vote at any election of a member of parliament, by virtue of a freehold, unless he shall have registered the same within eight years, in manner following, that is to say,—he shall, in open court, &c., take and subscribe the oath, or if a Quaker, the affirmation, set forth in that section. The 35th section enacts, that every oath or affirmation, made or subscribed at any session of the peace as aforesaid, shall be read aloud in open court, and be signed by two Justices of the Peace, and shall be then delivered by the court to the acting Clerk of the Peace, to be filed and kept amongst the records of the county, town or city. By the 33d section, it is provided, that in case any person who has registered a freehold, under this act, shall desire to register the same freehold at any subsequent time, all the words in the foregoing oath after the words, “Rent Charge,” shall be omitted, and the following words inserted: “and that I registered the said freehold on the — day of —, (*naming the day, when the affidavit of registry was delivered to the acting Clerk of the Peace.*)—[CHIEF BARON. Was there a certificate under that act?]—Yes; the 41st section enacts, that the Clerk of the Peace shall give to every person, immediately on the registry of his freehold, (if he shall demand it,) a certificate signed by himself, certifying such person having duly registered the same, and reciting his oath or affirmation exactly therein, under a penalty of £5; which certificate is declared to be of equal authority with the original oath or affirmation, if lost or mislaid. Section 42 enacts, that the acting Clerk of the Peace shall, during every sessions, enter in a book in alphabetical order, according to the names of those registered, the substance of every such oath or affirmation delivered to him, in the form therein prescribed. It is observable, that the *certificate* is to be given *immediately on registry*, if demanded, but it is sufficient if the *entry* be made *during the sessions*. By section 43, every Clerk of the Peace shall, from time to time, within ten days after every sessions, deliver to the treasurer of the county a true copy of every entry of registry, by him made at such sessions; to be kept by the said treasurer amongst the accounts of the county;—and at the request of any freeholder, the Clerk of the Peace, or Treasurer, shall, within ten days, deliver to such person a true copy of the registry of all the freeholders who shall have been registered. The 1st, 15th, and 19th sections of the 37 *G. 3*, c. 47, curing defects in the affidavit, also clearly shew that the affidavit is a part of the registry. At first then, the registry consisted of depositing a claim amongst the records of the county.—Afterwards, the 35 *G. 3*, c. 29, s. 31, defines the registry to be taking and subscribing the oath, which is to be placed amongst the records of the county.

Subsequent acts enjoin some preliminary requisites, but there is no alteration as to what constitutes the act of registry.

At this time, no previous examination was necessary, but by the 10 G. 4, c. 8, s. 7, it is enacted, that the Assistant Barrister shall investigate the claim to register; and by section 8, of the same statute, it is further enacted, that if he shall adjudge the claimant entitled, the latter shall take the oath thereby prescribed. This statute leaves the act of registry unchanged. The 2&3 W. 4, c. 88, adopts the provisions of the former act, but does not alter that which is the essence of registry; so far as it touches the registry, it adopts and confirms the definition given by the 35 G. 3, c. 29; for by sec. 46 it enacts, that it shall be lawful for £50 freeholders and clergymen to register, by taking and subscribing the proper oath in any of the superior courts, or before a Judge at the Assizes; and directs, that it shall be delivered to the Clerk of the Peace, and placed amongst the records of the county.—[CHIEF BARON. I certainly concur with you in thinking that under the old statutes, the act of registry may be said to consist in taking and subscribing the oath.] The 60 G. 3, and 1 G. 4, c. 11, (sections 8, 10,) shews that the entry in the book is not the registry, for it refers not to the book, but to the certificate, which, if it agree with the entry, is made conclusive evidence, and equal to the original affidavit; and, in default of the certificate, it refers to the original affidavit. The 28th sec. directs the Clerk of the Peace, immediately after each affidavit or affirmation is made, and signed by the presiding Justices, to enter in a book the substance thereof. The Reform Act says nothing of any entry in the Clerk of the Peace's book. The 4 G. 4, c. 55, (sections 12&13,) also clearly shews that the entry in the Clerk of the Peace's book cannot be the act of registry. The form of expression used in the 27th section of the Reform Act, viz., the *active* verb "to register his vote" shews it is an act of the voter. The Reform Act leaves all respecting the Clerk of the Peace's book as it found it. In the case of counties or cities, therefore, we must refer back to the 4 G. 4, c. 55. By the 13th section of that act, the Clerk of the Peace is directed, within ten days after each affidavit of registry shall have been made, to enter in a book or books the substance of every such affidavit. This is demonstration that the *entry* is not the registry, for the voter had been registered ten days before, and had actually received a certificate to that effect. The Clerk of the Peace's book is only an index to the affidavits, by help of which, at the election, the affidavit is found, in case of the loss of the certificate. The 30th section of the Reform Act shews that the affidavit is the proper evidence. The original affidavit must be produced and not the book; besides, there can be no entry in this book unless an affidavit *has* been made, for, it is the substance of the affidavit that is to be entered.

It is, therefore, clear, from the whole series of legislation upon this

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subject, that "to register his vote," in the 27th section of the Reform Act means, to make and subscribe the affidavit, and place it amongst the records; and when it says that, on producing the certificate, he shall be admitted "without further proof or oath, to register his vote," it places him, by the mere production of the certificate, in the same position with a claimant who has made the preliminary oath, and the preliminary proof, which are required in all other cases, before a claimant can be declared entitled to register, i. e. to make the affidavit. The 28th section seems to place this beyond a doubt: it enacts, that in every case in which a certificate is granted, it shall be entered at foot of the affidavit of registry; thus shewing, that the act does not contemplate a certificate of registry without an affidavit. From the language of the 22d section, it has been contended, that the mere production of the certificate is sufficient; but no argument can be drawn from that section in aid of the 27th.—[CHIEF BARON. It would be very difficult to give those two sections a different construction.]—They are, however, in some respects different. By the 22d section, which relates only to the first session, reference is allowed to the former affidavit, *if it shall appear expedient*; and, if the Assistant Barrister be satisfied it is correct, he is not required to inquire further as to the right of voting, but shall direct the same, that is, the right of voting, to be registered, and a certificate to be granted, without further oath or proof. The reason is obvious; the Reform Act swept away all former registries, which might only have been a few months effected. And this was but just as the former registry would have continued eight years, had it not been cut short so unexpectedly. But by the 27th section, no reference is allowed to any former affidavit, not even in case of the loss of the certificate. The difference in this respect, between these sections corroborates, as it is submitted, the view which has been taken throughout this argument. The argument for the appellants assumes, that no affidavit was necessary under the 22d section. The 28th section shews, on the contrary, that every person registered under the Reform Act is contemplated as having made an affidavit, (which is, in fact, part of the act of registry), by directing the entry of the certificate to be placed at foot of the affidavit of registry. But the language of the 22d section will be found not to warrant the assumption that no affidavit was necessary. It enacts that a certificate of registry, previously in force, shall be *prima facie* evidence of the right to be registered; and that the person producing, or causing to be produced, the certificate, shall be entitled to register AND obtain his certificate under this act, without further proof or oath, unless cause to the contrary appear. This shews that the certificate is not the registry. Cause may be shewn to the contrary also, and this may be out of the mouth of the voter himself. The 22d section further enacts, that in cases where no certificate is

produced, or in case it appear expedient, the Assistant Barrister may refer to the original affidavit, (at foot of which is a copy of the certificate), or transcript or record or entry thereof; and if he shall be satisfied, on inspection thereof, that such affidavits or entries are correct, it shall not be necessary for him to inquire *into the right of voting* claimed, but shall direct and allow the same, (that is the right of voting,) to be registered, and the claimant to have his certificate without oath &c., unless cause to the contrary shall appear. Mr. Moore has pressed an argument, drawn from the 23d section, which directs, that 40s. freeholders and £5 householders shall appear before the Barrister on a claim to register. It is said, why enjoin those particular classes of voters to appear, if all other classes of voters are equally bound to appear before the Registering Barrister?—The answer is, that the claims of those classes were considered by the legislature as peculiarly liable to suspicion: and that it was, therefore, intended that they should be bound to support their claims anew, and submit to a personal examination.

Again, with respect to the words “produce or cause to be produced,” in reference to the certificate, they do not mean, as has been contended, that the certificate may be produced by the *agent* of the person claiming to register, but they were intended to meet the case of a party not having his certificate in his own possession, as, for instance, where it is in the possession of the landlord, agent, or Catholic Priest. Finally, if we look to the policy of the law—what a door is opened to the grossest fraud, by the construction contended for on the opposite side? A construction which would allow a certificate eight years old to supersede the claimant's sworn attestation of his right; which would make it conclusive of identity; of a continuing qualification; continued occupation; unaltered value; and, in cases of householders also, of payment of taxes, of which last, it is, plainly, not even *prima facie* evidence. Further, if a new certificate were granted, without a new affidavit, it would be impossible to prosecute effectually, for perjury, a person who had parted with his qualification, if he took the oath at polling, as prescribed in schedule B. of the Reform Act. The effect of the construction contended for would be, to make the registry of 1832 perpetual, and to leave it without any check, inasmuch as election committees have refused to open the registry. Upon these grounds, it is submitted, that the rejections in both cases should be affirmed.

Mr. Smith, Q. C., followed on the same side.\*

\* From the length to which the report of these cases has already run, it has been found impossible to give even an outline of the able argument of this learned gentleman.

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At the conclusion of the argument, the CHIEF BARON stated, that from the importance of the questions arising in these cases, he would reserve them for further consideration.

*Thursday, January 10th, 1839.*

His LORDSHIP, on this day, delivered his judgment to the following effect :—

THE CASE OF ALEXANDER SETON, ESQ.

This case comes before me, upon appeal from an order of the Registering Barrister for the city of Dublin, whereby he rejected the claim of Mr. Seton to be registered anew, under the provisions of the 27th section of the act of the 2 & 3 W. 4, chap. 88, as a £10 leaseholder. It appears, by the order appealed from, that Mr. Seton was registered on the 30th day of October, 1832, pursuant to the above act; that he served due notice of his intention to make the present claim at the late Registry Sessions; that he attended in person at the Sessions, and there produced the certificate of his former registry, and, in the words of the order, “under the 27th section of the above act, demanded a new certificate of registry, upon production of the former certificate, without giving any further proof of his qualification, or answering any question, or making or subscribing any new affidavit of registry.” The order further states, that the Registering Officer, being of opinion “that Mr. Seton was not entitled to a new certificate of registry, under the above circumstances, rejected him.” From this order of rejection there is an appeal to me, under the 25th section of the same act, as extended by the 27th and 44th sections. The first question which was opened, upon this appeal coming to be heard, was this:—the counsel who opposed the claim contended, that I should require the claimant to go through the whole of his case, as if he were in the court below; and upon such case as he might make before me, that I should decide upon admitting or rejecting him. The claimant's counsel, on the contrary, insisted, that my judicial function upon the appeal was confined to the examination of the order made by the court below, which is appealed from, and to pronouncing upon its sufficiency or insufficiency; and in this opinion I concur.

I am of opinion, that, under the 25th section of the act, the *first*, if not the *whole*, judicial duty of the appellate court, is, to examine the validity or invalidity of the order appealed from. That it is the *first* duty to be performed by it admits of no doubt. In cases of rejection, for any other cause than want of value in the holding, I think that the appellate judicial authority does not go beyond pronouncing upon the order. There remain, in such case, other acts to be done by the Judge

if the order be reversed ; but they are ministerial. There is a distinction, in this respect, between the case of appeal from an order of rejection, for want of value, under the 24th section, and for any other cause, under the 25th section ; but this latter point I am not called upon, by the circumstances of the case, to decide.

I, therefore, pass to the consideration of the order, as made by the Registering Barrister.

On the part of the claimant it is contended, that, having been registered within eight years, he is, by the express terms of the 27th section, " unless cause shall appear to the contrary," entitled to a new certificate of registry, upon producing the old certificate, without either proving anew his title to be registered, before the Registering Barrister, or taking and subscribing anew any oath, after the Registering Barrister shall have adjudicated in his favor ; both of which are required in the case of an original claim to be registered. On the part of the persons opposing the claim, it is admitted, that the production of the old certificate gave the claimant a "*prima facie*" right to be exempt from " proving his case" before the Barrister, but it is insisted that the production of the old certificate does not, in any case, exempt the claimant from the necessity of taking and subscribing " the oath" set forth in schedule C.

The question turns upon the construction of the 27th section, which regulates the mode of registry, at all sessions subsequent to the first special sessions. The 15th section, and the several sections immediately following the 15th, down to the 27th, had already prescribed, very minutely, the mode of proceeding when the claim to be registered should be made at the first special sessions ; and the 27th section adopts the same course of proceeding for the subsequent sessions. It directs, that after the first session, any person claiming to register shall give notice of his intention, and that the Clerk of the Peace shall proceed, with regard to the notice, as directed in the former sections, in respect to applications at the special sessions ; and that the Assistant Barrister shall hear and determine such applications " as at the special sessions, and thereupon the same proceedings shall be had, the like orders shall be made and the *same oaths shall be taken* and the like certificates granted, and the like rights and powers of appeal shall be enjoyed and exercised, and the like rules and regulations, enactments and things, observed, performed and followed, as if such application had been made at the first session for registering votes, under the " act." Then come these words, " provided always that a certificate of a former registry under the act shall be deemed and taken to be "*prima facie* evidence of the right of voting ; and that any person, having given notice of his intention to register anew under this act, shall, upon producing or causing to be produced, such former certificate, at the sessions for that purpose to be held, be entitled and ad-

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"mitted to register his vote, and to obtain a new certificate under the act, without further proof or oath, unless cause to the contrary shall appear; and shall, by virtue of such new certificate, be entitled to vote, at any election or elections, to be held within eight years next after the obtaining of such new certificate." The 22d section contains the corresponding provision, with respect to the registry at the first special sessions.

Now, upon these sections, it is not disputed, on either side, that if the claimant produced his old certificate, and if no cause be shewn to the contrary, he is to get a new certificate; and he is to be entitled to vote, by virtue of that new certificate, for eight years more, and, in the words of the act, (whatever they may mean) he is to get this new certificate "without further proof or oath." The parties claiming and opposing differ as to what the words "without further proof or oath" were intended to signify; but, whatever they were intended to signify, the parties agree, that the certificate is to be given to the claimant "without further proof or oath."

The question is, what do these words in the statute "without further proof or oath" mean? The counsel for the claimant say, that the word "proof" means the proof required to be adduced on an original registry, before the Registering Barrister, of the claimant's title under the 17th section of the act, and that the word "oath" means the oath which, under the 19th section, the original claimant is required to take and subscribe, after the Barrister has adjudicated in favor of his claim, and the form of which oath is given in schedule C, annexed to the act.

The counsel opposing the claim admit the interpretation of the word "proof" insisted on for the claimant, and acknowledge that it is dispensed with, but they contend, that the word "oath" does not mean the oath to be taken and subscribed by the claimant, after the adjudication by the Barrister in favor of an original claim; and, that notwithstanding those words "without oath," the claimant shall not get the certificate, without taking and subscribing the oath in schedule C, and that his right to vote, at a future election, shall be by virtue of his having taken again such oath in schedule C, and not by virtue of the new certificate.

Now, this appears to me to be doing very uncalled for violence to the plain words of a very plain section, and is a construction which I most confidently reject. See how the matter stands: an original claimant to obtain a certificate is obliged, first, to make proof before the Registering Barrister of his title to be registered; secondly, he is, after an adjudication in his favor, to make and subscribe a form of oath given in a schedule. The first step is required by the 17th section. The second is a separate and distinct act, and is required by the 19th section, and it cannot be performed until the first is completed. This proof

and oath are both necessary, in the case of an original claim, and they are the only proof AND oath that are to be taken in such case. Then comes, in the 27th section, a provision for a case where a party seeks to be registered anew. The section says the old certificate shall be *prima facie* evidence of his right to vote, and he shall get his certificate without further "proof or oath"—what proof or oath? The proof and oath, surely, which gave the right to vote to the original claimant, that is, the proof before the Barrister and the oath in the schedule C. This construction satisfies and gives a meaning to both words, "proof and oath." The contrary construction strikes out the word "oath" altogether, and reads the clause as if it contained the words without "proof" only. These words occur also in the 22d section, and is it contended, that there too the word "oath" is to be struck out or nullified?

I listened to the argument of the learned counsel who opposed the claim, with great attention, and have duly reflected upon it since; but I confess I am, to this moment, in uncertainty, whether or not they hold that, under the 22d section, a party claiming to be registered anew, at the first special sessions, was bound to take and subscribe the oath in schedule C, in the absence of cause shewn to the contrary. If they do not contend for that, if they admit, that under that section the oath need not be taken, it seems to me to be utterly impossible to hold that it is required under the 27th section. There is no difference between the two sections, from which it is possible to argue for any difference of construction upon this point. There is, it is true, embodied in the 22d section, a provision not found in the 27th, to meet the case of a person seeking to register anew, who had lost his old certificate. The 22d section allows the Barrister, in such case, to supply the want of the old certificate, by looking into the original affidavit, or the entry thereof in the Clerk of the Peace's book; and if he finds them correct, he is to proceed as if the certificate were produced. The Registering Barrister is also, if he thinks fit, under the same section, to look at the *original* affidavit, or the transcript of it in the office, although the original certificate is produced; but these provisions have nothing whatever to do with the question, whether, under the 22d section, the claimant is to take the oath anew. When the Barrister, acting under the 22d section, is satisfied (if the old certificate is not produced), that there is satisfactory evidence of it on record—or (if it be produced), that it corresponds with the record, the claimant is declared entitled to be registered, and to get his certificate, without further proof or oath, in the same terms as are used in the 27th section:—so that the only difference between the 22d section and this part of the 27th section is, that the one makes secondary evidence of the old certificate sufficient for the claimant, which the other in terms does not, and enables the Barrister to compare the old certificate, if it be presented, with the record. But, as to the

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"proof" to be adduced, and the "oath" to be taken (or rather not to be adduced and taken) by the claimant, under both sections, they are exactly alike: and, even with regard to the secondary evidence of the old certificate, I doubt if the provision touching it, found in terms in the 22d section, is not extended to the 27th section, by the general provision of the 27th section, which I have already read, and which directs that the same proceedings shall be had, the like orders made, "*the like oaths taken*," the like certificates granted, the like rights and powers of appeal enjoyed and exercised, at the first and all subsequent sessions.

I consider it, therefore, impossible to give to the 22d section a construction different, upon this point, from that which the 27th is to receive: and, if the construction of both is to be alike, the 23d section is pregnant with proof, that the personal attendance of the claimant to be registered anew was not necessarily required by either—for the 23d section excludes from the privileges given by the 22d section the 40s. and £5 freeholders, whose franchises were continued by the Reform Act; and, in express terms, requires THEIR personal attendance, proof of THEIR identity, and proof of THEIR title. If, under the 22d section, the claimants were not bound to appear in person, it is clear they were not bound to take the oath in Schedule C.

It therefore seems to me, that the 22d section and the 27th section must receive the same construction; and accordingly, the main argument against the construction given to them by the claimant applies equally to both sections. That argument is that in both these sections, the production of the old certificate is made *prima facie* evidence of the right to be registered, and entitles a party to *be registered*, but, that still the claimant must *be registered*, or go through the form of the registry, and that the registry consists in making and subscribing the oath, which is to be put on record. For the purpose of shewing that the registry does consist in taking and filing this oath, a learned and minute examination of the Registry Acts, from their commencement, has been gone into; and, I think, it has been successfully shewn, that down to the 10th G. 4, the Act of Registry might fairly be said to consist in taking and subscribing, and filing the oath. I will go farther, and I will concede, that under the 10 G. 4, (and under the Reform Act, in cases of original registry), the taking and subscribing the oath to be kept on record is the act that completes and consummates the registry, and that there was no registry without it. But this is so, because, under those acts, the legislature has thought fit to make the oath either the actual registry or essential to the registry, but not from any necessary, or natural, or indissoluble connection between taking the oath and acquiring, or, (as in this case), prolonging, or renewing the right to vote at elections. The most that can follow from this concession is, that if the legislature had merely said, that a party producing the old certificate should be en-

titled to register anew, and had stopped there, such party might be obliged to take and subscribe the oath; but it would not warrant the conclusion, that where the legislature has said, that a party shall be entitled to be registered, or to vote at elections (which is the same thing), without proof or oath, there an oath must, notwithstanding, be taken. The 22d and 27th sections declare, that the new certificate, upon production of the old, shall be given without further proof or oath; and the 27th section enacts, that the claimant shall vote by virtue of such new certificate, which is equivalent to saying, that the party shall stand registered by virtue of the new certificate.

That I am right in saying, that acquiring the right to vote under these acts, and particularly under the Reform Act, is equivalent to, and synonymous with, "being registered," appears from this: that these terms are used, obviously, in the same sense, and as identical in import, in the 22d and 27th sections. The proviso in the 22d section is, "provided that a certificate of registry, made pursuant to the laws in force in Ireland previous to the passing of this act, shall be deemed and taken to be *prima facie* evidence of the right to be registered;" and in the 27th section, the proviso is, "provided that a certificate of a former registry, under this act, shall be deemed and taken to be *prima facie* evidence of the right of voting."

I cannot, therefore, see, that taking and subscribing the oath is so essentially and indestructibly the essence of a right to vote; that the legislature cannot be held to have conferred it without exacting the oath; and, I cannot hold that it has exacted the oath, when I find, that in express terms it has dispensed with both proof and oath.

Another argument was also pressed, not founded upon any technical refinement upon words, but upon the broad ground, that the construction contended for by the claimant would open the door to great frauds. The answer to that is, that the door to fraud has been opened, if at all, by the legislature having dispensed with proof of title in these cases. This, it is admitted, the legislature has done. If the legislature thought it right to dispense with the examination into title, which it imposes in the case of an original registry, it is not surprising, so far as the prevention of fraud is concerned, that it should dispense with the mere form of an affidavit. The affidavit was not, in the opinion of the legislature, a fence against fraud. The legislature tried it, and found it wanting. It then introduced the examination of the party in open court, and proof before the Barrister. When we find that it has dispensed, in cases of registry anew, with this examination and proof, which it *did* rely on as a guard against fraud, it is absurd to contend that it retained, for that purpose, the affidavit, which had been proved to be inefficient. Upon this part of the case, I may also refer to the 23d section, which in terms provides, that no part of the facility given by the 22d section for

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registering anew shall extend to the 40s. and £5 voters, whose rights were continued by the Reform Act. This clause shews, that where the legislature apprehended fraud, the course it took was, not to dispense with the proof and personal examination, and require an affidavit, but, to require proof and personal examination and the affidavit.

It was also urged, as an argument *ab inconvenienti*, that unless we hold an affidavit to be necessary upon a new registry, there will be no record in the public office of the new registry; but, I think, if we refer to the 28th section, it will be found that this inconvenience need not occur. I think that the duty of the Clerk of the Peace, under that section, is to make an entry of the new registry on the foot of the original affidavit; it is also the duty of the Clerk of the Peace and Barrister, under the 35th section, to make out and publish, on or before the 1st of February, in every year, lists of the persons registered, and the dates of their registries; the names of the persons registered anew would, of course, appear in this list, with the date of their registry anew. But, although I hold that the 27th clause gives the right to the claimant to the extent I have stated, it is, clearly, only a *prima facie* right: and this furnishes another answer to the argument grounded on the apprehension of fraud; it is expressly given as a *prima facie* right, and only if cause to the contrary shall not appear. \* I think, therefore, that it is open to any person who may oppose an original claim, to oppose a claim to register anew, and he may do so by the same means. If a claimant be in attendance, as Mr. Seton was, and a cause be alleged against his claim to be registered anew, he has no right to refuse being examined, to substantiate such objection.

I think the 27th section, in the case of registries anew, merely shifts the burden of proof from the claimant to the party opposing him. It leaves the claimant's qualification unvaried, and it does not take away from the person opposing the claim any means of proof, which he might have used in opposition to the original claim. Indeed, the contrary of this has not been contended by the plaintiff's counsel; it would be impossible to do so. Now, upon looking into the order appealed from, I find that Mr. Seton claimed to be registered, without answering any questions whatsoever, on oath. It does not appear upon the face of the order, whether any one, duly authorised, required to examine him on oath, for the purpose of sustaining any cause shewn against his *prima facie* right. There is a want of fullness in the order in this respect; if I confine myself to it, I cannot affirm that Mr. Seton was justified in the entire of the claim he made, or that the Registering Barrister was wrong in making the order. If I am to supply the uncertainty or deficiency in the order, by what has been stated at the bar in argument, and conceded upon both sides, Mr. Seton did altogether refuse to be sworn, to answer questions to be put to him by counsel attending to oppose his claim.

This, I conceive, Mr. Seton was not warranted by the 27th section in doing. I, therefore, think, that the Barrister was right in rejecting him. I, therefore, affirm the order, upon this ground, that, although Mr. Seton had a *primâ facie* right to a new certificate, without proof adduced by him, or taking anew the oath in schedule C, it was competent to any person, who might have opposed an original claim, to displace his *primâ facie* right, by disproving his qualification, and to use all the evidence for that purpose, which he might have used in opposing the original claim.

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## MR. M'CLELAND'S CASE.

Mr. M'Cleland's is similar to Mr. Seton's, with this additional circumstance, that Mr. M'Cleland did not appear in person, but Mr. Seton applied, on his behalf, for a new certificate, Mr. Seton producing the old, and stating that he was authorised by M'Cleland to make the application. It was insisted, on behalf of Mr. M'Cleland, that the right to the new certificate is given in terms by both the 22d and 27th sections, as well where the party "produces," as where he "causes to be produced," the original certificate. I am of that opinion. It was urged by the counsel who opposed M'Cleland's claim (in addition to the arguments relied upon against Mr. Seton's claim), that there ought to have been evidence given on his part, that Mr. Seton was authorised to apply for him; but I think that the bare production of the certificate is *primâ facie* evidence, that the person producing it has such authority. It is, however, only *primâ facie* evidence of that fact; and Mr. Seton had no right to refuse to be sworn on the part of the persons opposing Mr. M'Cleland's claim, to enable them to shew he had no authority to prefer the claim. I think his refusal justified the Registering Barrister in rejecting Mr. M'Cleland's claim. I, therefore,

Affirm the order of rejection.

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 REGISTRY APPEAL.

*Monday, December 31st.*

## NOTICE OF REGISTRY—REFORM ACT.

*In re JOHN FINLAY, Esq.*

The claimant was rejected by the Registering Barrister, because, in his notice of registry, his residence was stated to be in "North Cumberland-street," whereas, it appeared that there were two streets, Upper and Lower North Cumberland-street.

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Mr. *Hayes* opposed the claim, and insisted that, as a rule of practice adopted by the court below, it ought to be enforced by the Court of Appeal, unless it were found, in its nature, to be illegal or unjust. By the 47 G. 3, sess. 2, c. 109, the Commissioners of Paving were authorised to distinguish the streets, by labels affixed to them; and to put an end to all controversy, the Registering Barrister for the city of Dublin had resolved to adhere to this rule, and to require that the name which was attributed to the street by the Paving Corporation, should be inserted in the notice.

The CHIEF BARON was of opinion, that it was a very proper rule of practice, and      Affirmed the rejection.

### REGISTRY APPEAL.

*Same Day.*

### NOTICE OF REGISTRY—REFORM ACT.

*In re* ROBERT SINNOTT.

Defective  
 notice of  
 registry.

The claimant in this case was likewise rejected for an informality in the notice of registry. The notice stated the residence to be in "Bishop-street," without stating whether it was in the city or county of Dublin. The claimant sought to register as a leaseholder, in respect of premises in Bishop-street, in the parish of St. Peter, and county of Dublin, within the circular road.

Mr. *Hayes*, against the claim, urged that the rule of practice, which had been long adopted by the court below, ought, in this case also, to be adhered to. The rule was, that in all cases of the non-occupation franchise, and where the party did not live in the city of Dublin, it was held necessary to state, particularly, in what county the residence was; where the county was not stated, the presumption was, that the residence was in the city of Dublin, which presumption was here falsified by the fact, the claimant actually residing in that part of Bishop-street which is in the county of Dublin.

The CHIEF BARON thought it quite necessary, that some rule should be laid down, by which the residence of the party should be ascertained; for any thing that appeared on the face of the notice, the party might not have resided either in the city or county of Dublin.

Rejection affirmed.

**COURT OF COMMON PLEAS.**  
**MICHAELMAS TERM, SECOND VICTORIA.**

**REGISTRY APPEAL.**

SITTINGS AFTER MICHAELMAS TERM,

*Wednesday, November the 28th.*

**FREEMAN—REGISTRY—CERTIFICATE—REFORM ACT.**

*In re* **ROBERT ANTHONY DISNEY, Appellant.\***

Robert A. Disney applied, on the 10th of November, 1838, at the City of Dublin Registry Court, to be Registered as a Voter for a Member of Parliament. He was sworn, and produced the Town Clerk's Certificate of admission to the freedom of the City, at Michaelmas assembly, 1838, signed, "Archer and Long," town clerks, by Mr. *Archer*, one of the town clerks; and which certificate was in the following words:

"Memorandum :—that, at Michaelmas Assembly, 1838, Robert A. Disney, Merchant, was admitted into the liberties and franchises of the City of Dublin, by birth, and took the usual oaths, and was enrolled. In testimony whereof, the same is signed by the town clerks, this 6th day of November, 1838—Archer and Long, Town Clerks."

Robert A. Disney was rejected by Mr. Dobbs, the Registering Barrister, on the following ground, as taken from the Clerk of the Peace's book :

"Robert A. Disney claimed to be registered as a person entitled to vote at Elections of a Member to serve in Parliament for the City of Dublin, as a freeman by birth; and produced a certificate of admission, as a freeman by birth, admitted at Michaelmas Assembly, 1838; signed by the Town Clerk. Claimant having been sworn, was examined as to having taken the usual oaths before the Lord Mayor and Sheriffs, and his having obtained the town clerk's certificate of admission produced by him; but

Town Clerk's certificate of admission produced by him; but refused to answer any questions upon cross-examination, touching the validity of his admission to the Corporation in such capacity; for which reason he was rejected by the Registering Barrister :

**HELD**—by the Twelve Judges that he was rightly rejected.

The validity of the admission of a freeman claiming to register under the 2nd & 3rd William IV. c. 88, may be questioned at the registry.

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\* This case is given *Ex relatione* Mr. Ross S. Moore.

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" having refused to answer any questions upon cross-examination, touching  
 " the validity of his admission to the Corporation in such capacity, I rejected  
 " the claimant." " Conway E. Dobbs."

The claimant having appealed from the decision of the Registering Barrister, the case was argued on this day before the Lord Chief Justice of the Common Pleas, by

Mr. T. B. C. Smith, Q. C. and Mr. E. Hayes for the Appellant ;  
 and by

Mr. Richard Moore, Q. C. and Mr. Hutton, contra.

#### ARGUMENT FOR THE APPELLANT.

It is submitted in this case, that the Appellant made out a *prima facie* case. This point having been admitted by the Counsel for the Respondent, it is not necessary to argue it. The cases of *In re Carolin* and *In re Hyde*, (a) decided the point: and the uniform practice before the Eight Deputies, at the first Registry Sessions under the Reform Act, for the City of Dublin, was in conformity with that decision; such practice having been adopted after full argument before the Eight Deputies. (b) However, the point having been admitted, it becomes unnecessary to offer further argument on the question.

It has, however, been contended for the Respondents, that although the Appellant had been admitted by the Corporation, as a freeman by birth, yet that it is open to them—the Appellant claiming to register under the Reform Act, as a freeman by birth—to call upon the Registering Barrister to enter into an inquiry as to the *validity* of the Appellant's admission to the freedom of the Corporation, as a *freeman by birth*: and *Coulter's Case*, decided by the Twelve Judges, (c) is cited in support of this proposition. It will be submitted in the course of the argument for the Appellant, that *Coulter's Case* decides no such thing. But, before adverting further to that case at present, it will be more convenient to put forward the several grounds, on which the Appellant submits that the decision of the Registering Barrister was erroneous.

*First*—It is submitted that it is a settled principle of law, that the validity of the titles of Corporators to their franchise, who have been admitted, sworn, and in the actual enjoyment of their office, cannot be tried in a collateral and incidental proceeding.

The following cases establish that proposition:—*Symmers v. The King* (d); *The King v. Hughes* (e); *The King v. The Corporation of Penryn in Cornwall* (f).

(a) 3 Law Rec. (2nd series) 230. S. C. Jones, Rep. App.

(b) See Alc. & Nap. App. xv. (c) Alcock's Reg. Ca. 7. (d) Cowper 489.

(e) Barn. and Cress. 378. (f) 8 Mod. 215.

In the case of *Symmers v. The King*, it was laid down by Lord Mansfield that the disfranchisement of a freeman, could be done ONLY by information in the nature of a *quo warranto*, and that the Judge could not have gone into the question of the validity of the men's titles collaterally at the trial.

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Lord Mansfield also says: "But where the right of election is in freemen in their corporate description; whether they were duly chosen or not, is not to be tried at the election of a third person; but they must be properly ousted."

There is no case in the books, the law of which is considered better settled than the above case; and it is recognised as settled law, and was acted upon by the Court of King's Bench, in England, in *The King v. Mein*, (a); and *The King v. Hughes* (b). In the former of these cases, a rule had been obtained, calling upon the defendant to shew cause, why an information in the nature of a *quo warranto* should not be exhibited against him, to shew by what authority he claimed to be portreeve of the borough of *Fowey*, in *Cornwall*, an officer elected by the Prince's tenants, duly admitted upon the Court Rolls, and by the inhabitants paying scot and lot. Lord Kenyon, in pronouncing the judgment of the court upon the motion to shew cause against the rule, says:—"But then it is objected, that the titles of electors cannot be impeached through the medium of the elected; and the case in *Cowper* has been relied on; but there, the electors were members of a corporation, whose titles might have been questioned in *quo warranto* informations."

The same principle has been acted on, prior to the Reform Act, by Committees of the House of Commons, in not trying the right to a corporate franchise by any indirect proceeding, where time and opportunity permitted to have had the question decided by *quo warranto* information against the corporation. In *Samuel Buxton's Case*, (c) it was decided that the Committee would not question the title of a corporator when there had been time to remove him by *quo warranto*. In *Deane's Case*, (d) the same point was decided. And in the case of *Weymouth and Melcombe Regis*, (e) the Committee refused to hear impeached the titles of voters who might have been proceeded against by *quo warranto*.

Now this principle more strongly applies to the Registry Court. For the freeman, it has been decided by Committees, (f) cannot vote until six months after he has been registered. And an opportunity is thus afforded

(a) 3 T. Rep. 596.

(b) Barn. and Cress. 368.

(c) 1 Peckw. El. Ca. 477.

(d) 1 Peckw. El. Ca. 393.

(e) 2 Peckw. El. Ca. 229.

(f) John Power's Case, *Youghal*, (Knapp, and Ombler, 448).



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to remove a party by *quo warranto*, who improperly usurps the office. The judgment in the *quo warranto* will be the proper evidence of *ouster*.

It is then to be considered, whether the Reform Act alters this general principle of law, of not allowing the right to a corporate franchise to be questioned by a collateral and indirect proceeding. The ninth section of the Reform Act, the 2 and 3 Will. IV. c. 88, it is conceived, clearly shews that no such inquiry is to be gone into.\*

The only inquiries justified under that section are, 1—Has the claimant been admitted to his freedom? 2—If so, has he been admitted by reason of birth, marriage, or service; or as an honorary freeman: and if admitted as an honorary freeman, was his admission prior to the 30th of March, 1831? 3—Does he reside within the seven statute miles? If the second and third questions are established in the affirmative, it is submitted that the ninth section authorizes no other inquiry; and that the Registering Barrister has no right and no authority to enter into a question as to the *validity* of the admission; which would be indirectly to allow him to disfranchise the claimant; and has no jurisdiction to go behind the admission, and to decide whether it was a case in which the inchoate right by birth, marriage, or servitude, existed—an inquiry which would not only affect the individual, but the rights of the Corporation at large. Suppose, for example, this question was sought to be raised before the Registering Barrister; viz. whether, to create the inchoate right to be admitted as a freeman by birth, the claimant should have been born subsequent to his father having been created a freeman. Is such a question, affecting the Corporation at large as well as the claimant to be discussed and decided before such a tribunal as the Registering Barrister? What machinery does the Reform Act give for such an investigation? He has no power to compel the production in his court of the city Charters or of any single document. Nei-

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\* The 9th section is as follows:—

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| <p>“ Provided always, and be it<br/>         “ enacted, that all freemen, free-<br/>         “ holders, and persons who by rea-<br/>         “ son of any corporate or other right<br/>         “ are now by law entitled to vote at<br/>         “ the election of a member or mem-<br/>         “ bers to serve in Parliament for any<br/>         “ city, town, or borough, and all<br/>         “ persons who, by reason of birth,<br/>         “ marriage, or service, or of any sta-<br/>         “ tute now in force, shall be at any<br/>         “ time hereafter admitted to their<br/>         “ freedom in any city, town, or bo-<br/>         “ rough, sending a member or mem-<br/>         “ bers to Parliament, shall, after<br/>         “ such registration as is directed by</p> | <p>“ this act, but so long only as they<br/>         “ shall reside within the said city,<br/>         “ town, or borough, or within seven<br/>         “ statute miles of the usual place of<br/>         “ election therein, have and enjoy<br/>         “ such right of voting as fully and<br/>         “ in like manner as if this act had<br/>         “ not been passed: provided fur-<br/>         “ ther, that no persons who, since<br/>         “ the thirtieth day of March, in the<br/>         “ year 1831, have been or hereafter<br/>         “ shall be admitted as honorary<br/>         “ freemen, shall be entitled, by vir-<br/>         “ tue of such admission, to vote or<br/>         “ register as freemen under this<br/>         “ act.”</p> |
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ther can he enforce the attendance of a witness. His *power* extends no further under the 39th section of the Reform Act, than to fine, in a sum not exceeding ten pounds, any person who "shall refuse to be sworn, or to give evidence before him, upon the investigation of any claim to register, without sufficient lawful excuse to be allowed by him, or, in default of payment of the fine, to commit such person to the gaol of the county, city, or town respectively for any term not exceeding two calendar months." His *duty*, under the 17th section, is, that he "shall inspect and examine every deed, lease, or instrument so produced, and shall investigate the claim made thereunder, or otherwise, to be registered, and shall determine upon the validity or invalidity of such claim, and shall and may examine and inquire, as well by the oaths of the claimants, as by any other evidence offered in support of, or in opposition to such claim, whether such claimant is or is not to be registered as a voter for the county, city, town, or borough, to which his claim shall relate.....and shall also inquire, by any of the means aforesaid, as he shall think fit, into the truth of the several particulars required by the provisions of this act, or required to be stated in any oath by such claimant hereinafter prescribed to be taken for such registry."

Inquiries of the important nature above alluded to, it is submitted, were never intended by the Legislature to be prosecuted by the Registering Barrister. The question to be decided before such tribunal is—whether the claimant has been *admitted* to the particular description of freedom, which, by the 9th section, gives the franchise of voting; and not, the *validity* of such admission. If a party exercise the franchise of a freeman by reason or right of birth, marriage, or service, never having had an inchoate right, and the allegation be false; it is submitted, that a *quo warranto* would clearly lie against him.

The case however, of *The Queen v. Cowen*, (a) is relied on as an authority, to show that a *quo warranto* would not lie against a party, for usurping the franchise of a freeman by right or reason of birth, marriage, or servitude, if he were an honorary freeman; and that therefore, the question may be raised at the registry. That case decides no such thing. A rule was obtained against the defendant *George Cowen*, to show cause why an information in the nature of a *quo warranto* should not be exhibited against him, to show "by what authority he exercises the franchise of a freeman by right of marriage, of the Corporation of the City of Dublin." The Court were of opinion, on the affidavits, that the Corporation had a right to create freemen by right of marriage, in contradistinction to honorary freemen.

(a) 6 Law Recorder (second series) 334; S. C. Jebb and Symes, 223.

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The Court therefore were bound to discharge the conditional order, which did not raise any question as to what the rights, which flowed from an admission to freedom by reason of marriage, were; the passage from Judge Burton's judgment shewing that the defendant had established a clear authority, in the words of the conditional order, "to exercise the franchise of a freeman by right of marriage." At the sametime, it may be very doubtful whether the conditional order could have been framed to raise the question of whether the right to register a vote flowed from such franchise; because, if it be clear that the claimant is a freeman by right of birth, marriage, or servitude, and that this is not disputed, the Registering Barrister may, according to the language of the Court, be the proper tribunal to determine whether the privilege of registering a vote be annexed to such franchise. If a party be rightfully admitted to the freedom of the Corporation as a freeman by marriage,—as was the case of *The Queen v. Cowen*, it is submitted, a *quo warranto* will not lie. But if a party were wrongfully admitted as a freeman by birth, marriage, or servitude, and without having any inchoate right, it is conceived a *quo warranto* would lie.

If the right of the Corporation at large, to create freemen by birth, marriage, or servitude, as contradistinguished from honorary freemen, be disputed; and that it is alleged, that the Corporation have usurped the privilege of creating freemen by right of birth, marriage, or service; in such a case, a *quo warranto* perhaps might be filed against the Corporation for such alleged usurpation, *Rex v. the Mayor and Aldermen of Hertford*, (a); and see *Rex v. Breton*, (b); or perhaps a criminal information: and an information in the nature of *quo warranto* would, it is conceived, also lie against the party who usurped a franchise which the Corporation had no authority to create, *Page v. the King in Error*, (c). If the right of the Corporation at large, to create freemen by birth, marriage, or servitude, as contrasted with honorary freemen, be admitted; but it is alleged that A. B. or C. D., although admitted as a freeman by right or reason of birth, marriage, or servitude, (as the case may be,) had or possessed no such inchoate right, and never was descended from a freeman or was not the husband of a freeman's daughter, or had never duly served an apprenticeship; in such cases, it is conceived that a *quo warranto* would lie against the individual, to show by what authority he exercised the franchise of a freeman by right of birth, marriage, or servitude, (as the case may be); and if it turned out on the affidavits, that he was not entitled to his freedom in such particular capacity, judgment of *ouster* should be pronounced against him, for exercising the franchise of a freeman by right of birth, marriage, or ser-

(a) 1 Lord Raym. 426; 1 Salkeld, 374. (b) 4 Burr. 2261.

(c) 2 Ridgw. P. C. 443,

vitute, (as the case might be), and for this reason;—that if the franchise of a freeman by birth, marriage, or servitude, have privileges annexed to it, such as a right to register a vote, which do not belong to an honorary freeman created since the 30th *March*, 1831, it is an usurpation to exercise the franchise of a freeman by right of birth, marriage, or servitude, by a person who never possessed the inchoate right, to warrant his being admitted to *such* franchise. It is submitted that it would be no answer to a *quo warranto*, to say; although I have no right or title to the franchise of a freeman by birth, marriage, or servitude, yet I am an honorary freeman. The reply to that would be, that you cannot, under colour of one franchise, exercise and claim a totally different franchise, to which additional privileges are annexed; and judgment of *ouster* ought to go against him, to remove him from the franchise of a freeman by right of birth, marriage, or service (as the case might be).

In the case of *The King v. Wakelin*, (a) it was held that a *quo warranto* would lie against a party, for exercising the office of member of a company of tailors; because, he might, as such member, claim at any time to be admitted a freeman of the city of Litchfield; so here, if a person, by reason of being admitted as a freeman by birth, marriage, or servitude, has a right to claim, *as such freeman*, the important privilege of registering a vote, by virtue of the 9th section of the Reform Act, a *quo warranto* would lie against him, for exercising the franchise of a freeman by birth, marriage, or servitude, from which such privilege flowed. And if it appeared that, by fraud or mistake, a party who had no pretence to an inchoate right by birth, marriage, or servitude, was admitted as if he had such inchoate right, it is submitted, that judgment of *ouster* from the franchise of a freeman by right or reason of birth, marriage, or servitude (as the case might be), could be pronounced. For, since the Reform Act, the franchise of a freeman by birth, marriage, or service, and the franchise of an honorary freeman, are different: and they would not in any way interfere with the party's being afterwards admitted to his honorary freedom.

If this be so, the question of the right of the Corporation to create freemen by reason of birth, marriage, or servitude, should not be raised before the Registry tribunal; the proper remedy, in such case, being, as it is submitted, either by a proceeding against the Corporation at large, or against a single Corporator; and should not be raised before the Registering Barrister. But if the right of the Corporation at large, to create freemen by birth, marriage, or service, as contrasted with honorary freemen, be admitted; and that the matter complained of is, that a *person having no inchoate right* by reason of birth, marriage, or service, has been admitted

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(a) 1 Barn. and Adol. 50.

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to the franchise of a freeman by birth, marriage, or service, from which the important privilege flows of registering a vote; that in such case, *quo warranto* lies against the individual usurping that franchise; and that the authorities referred to in an early part of the argument establish, that it is *only* by *quo warranto*, and not by any collateral or incidental proceeding, that the franchise is to be disputed; and that the ninth section of the Reform Act, so far from being at variance from, is in exact accordance with, this legal principle; and that it would be monstrous to hold, without express coercive words in the Act, that a tribunal, which, from its want of power to compel the attendance of witnesses, and production of documents, is totally incompetent to decide satisfactorily, should have the necessity imposed on it, of determining on the existence or non-existence of that franchise from which the privilege claimed flows.

It may further be observed, that the said 9th section provides and enacts, that all freemen admitted by reason of birth, marriage, or service, as therein mentioned, should after registration, and while resident, have and enjoy such right of voting as fully and in like manner as if that act had not been passed. An important consideration therefore arises as to what may have been the *right of voting* enjoyed by such freemen before the Reform Act. It was regulated solely by the 4. Geo. 4. c. 55. And here it may be proper to premise, that freemen had never been registered as electors of a Member of Parliament, until after the passing of the Reform Act. It was only required that proof should be given of their freedom, at the poll, when they came up to vote.

The 4. Geo. 4. c. 55, is entitled "An Act to consolidate and amend the "several acts now in force, so far as the same relate to the election and return "of Members to serve in Parliament, for Counties of Cities, and Counties "of Towns, in Ireland."

In the 30th, 45th, and 46th sections of that act, are enumerated all the *instruments of evidence*, by means of which the *right of voting* of every freeman is to be determined. No provision is made for compelling production of the charters of the Corporation, or getting evidence as to the customs by which its powers of admitting freemen are regulated.

By the 32nd section it is enacted, "That no person shall be admitted to "vote as a freeman, at any election of a Member to serve in Parliament, "whose freedom shall not have come to him by service, birthright, or marriage, unless he shall have been elected or admitted to his freedom, or "his freedom shall have been granted to him, six calendar months at the "least, before the teste of the writ for holding such election." This section was evidently levelled against the evil of making occasional freemen, who, the Legislature assumes, were always of the class called honorary freemen; and although all freemen were entitled to vote at elections, yet a restriction existing as to honorary freemen, (*viz.*, that they should be six months free,)

which did not exist as to those who were free by reason of birth, marriage, or service, the inquiry into the nature of the freedom was most material under this statute, as it would, in many cases, have determined the right of the individual to vote.

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The Act then proceeds, in the 52nd section, to detail the process of polling a freeman.

The Act then directs that, in case of objection to a vote, the deputy shall make a memorandum shewing for whom the vote has been given, and shall forward the objection to the Returning officer, or his Assessor, who shall decide whether the vote is to be allowed or rejected.

The 55th Section then enacts, "that if at any election for a member or members for any County of a City or County of a town in Ireland, it shall appear to the returning officer or officers, that any person tendering his vote or offering to poll at such election, has personated any freeman for the purpose of polling at such election, or that such person is not a freeman, or (unless the freedom of such person shall have come to him by service, birthright, or marriage,) that he has not been admitted to his freedom, or that his freedom has not been granted to him six months at the least before the teste of the writ for holding such election, then in any or either of such cases, such returning officer or officers shall reject the vote of the person so tendering such vote, or offering to poll at such election."

The above sections of the 4 Geo. 4. c. 55, comprise the whole code of law, regulating the *rights of voting* of freemen, prior to the passing of the Reform Act: and from even a cursory view of them, it must be seen, that the returning officer could make no inquiry at the poll, into the validity of the party's admission in any particular capacity, or into the existence or non-existence of the claim on which his admission purported to be grounded. With all that, he had nothing to do. He had no mode of ascertaining the facts beyond the mere statement on the face of the entry; and even though the facts had been fully and accurately detailed in evidence, still, a knowledge of the charters, usages, and customs of the Corporation, would have formed essential ingredients to his deciding upon the law which resulted from those facts. The *duty* of the returning officer was merely to satisfy himself, by inspection of the Corporation books and entries therein, that the party had been *de facto* admitted as a freeman in a certain capacity; or if he claimed to vote as an honorary freeman, that the entry bore date six calendar months before the teste of the writ. It was not possible for him to institute effectual inquiries into any alleged usurpations of the franchise. Finding the admission of the voter duly entered in the Corporation books, he permitted him to poll, leaving it to the Court of Queen's Bench, ("the only tribunal for the direct trial of Corporate rights," 3 *Dougl. El. Ca.* 70.) to determine whether he was rightly or wrongly admitted.

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It is submitted, that a similar course ought to be pursued by the Registering Barrister. He has only to satisfy himself that the claimant has been *de facto* "admitted to his freedom" by the Corporation, "by reason of birth, marriage, or service," and that he is resident within seven statute miles of the place of election. This is all that is required of him by the 9th Section; and there is no other section of the Act, which enables or authorizes him to do more. He cannot summon before him, neither can the claimant by any process compel the attendance of, the officers of the Corporation at large, or of any of its minor guilds; in whose absence no such inquiry could be prosecuted, with justice to the claimant. When seeking his freedom, he may perhaps have known or declared nothing further than the pedigree of himself or his wife, or the name of the person to whom he served his apprenticeship: all else after due ascertainment of these facts, the Corporate officers have taken upon themselves to decide and arrange, without further reference to the claimant, until he is called upon to attend and be sworn. Whether the corporation at large, or the minor guild, may have been right or wrong in their proceedings, is a question which could never be decided without reference to the Charters and Corporation books, and without the evidence of the officers of the Corporation or Guild, none of which are within the claimant's power to produce or even to examine. It would therefore be as unjust as, it is submitted, it is contrary both to the letter and the spirit of the Reform Act, to make the claimant's right to register as a freeman by reason of birth, marriage, or servitude, to depend upon the result of inquiries into the *validity*, rather than the *fact* of his admission in such capacity; inquiries which, confessedly, the tribunal is incompetent to conduct satisfactorily.

But there is another consideration, viz. whether the Counsel for the Respondents are well founded in their allegation that *Coulter's Case*, (a) is an authority at variance with the principles contended for in the previous argument; and whether it was competent for the Respondent to enter into the investigation before the Registering Barrister, touching the validity of the claimant's admission to the Corporation, as a freeman by birth.

Before adverting more particularly to *Coulter's Case*, who claimed to register as a freeman of the borough of Dundalk, by birth, as a son of a freeman, it will be proper to call attention to a decision of the House of Lords in this Country, as to the right of admission to the freedom of THAT Borough, solemnly decided on *quo warranto*. The case is *Page in Error*, v. *The King*, (b). In that case, an information in the nature of a *quo warranto* was filed against *Page* and others, for having taken upon themselves to exercise and use the privileges, rights, and franchises of freemen

(a) Alc. Reg. Cas. 7.

(b) 2 Ridgw. Parl. Ca. 443.

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of the Borough of *Dundalk*. The plea to the information set out certain letters patent of Charles the Second, incorporating the Borough of *Dundalk*, and granting that the Bailiff, Burgesses, and Commonalty, should have power and authority, from time to time, to elect and admit any person or persons of the commonalty of the said Borough, in the place or places of any member or members of the commonalty of the said Borough, who should from time to time be *disfranchised*, and in the place or places of any *deceased* person or persons, who shall be of the commonalty of the said Borough."

The plea then stated an assembly held of the bailiff, burgesses, and commonalty, on the 9th of *August*, 1782, who then and there duly elected *John Page* and the other defendants below, who were duly and regularly admitted to be of the commonalty of the said Borough. The plea then set out the taking of the several oaths, &c., then required by law, but did not state that any vacancy had occurred by disfranchisement or death, as required by the Letters Patent set out in the Plea.

The fourth issue joined was, that the defendants below were not duly or regularly admitted. A special verdict was found, setting out the letters patent and the several facts at length; and, on the fourth issue, the Jury found that the defendants below were admitted to be of the commonalty; but whether duly admitted or not, the Jurors are altogether ignorant, &c.

Judgment having been given for the Crown in the King's Bench, a Writ of Error was brought to the Irish House of Lords, where the judgment of the King's Bench was affirmed.

From this decision—a solemn decision, by the proper and legitimate course, namely, by *quo warranto*, it appears that there is not in the borough of *Dundalk*, any right by reason of *birth* to be admitted as a freeman—that the number of freemen is limited—and that it is necessary that a claimant seeking to establish that he is a freeman of the borough of *Dundalk*, should, in making out his title, shew that he was admitted to fill a vacancy *occasioned by the death or disfranchisement of one of the limited number of freemen*. This, of course, is to be established in the usual way, either by an entry in the Corporation books, or by a certificate of the Corporation.

Now, what was *Coulter's Case*? He produced as a witness the Town Clerk, who produced an entry in the Corporation book of *Coulter's* admission as a freeman entitled by *birth*.

The Judges were unanimous for the rejection of the vote.

Now, in the first place, where the House of Lords had decided on a *quo warranto* against a person claiming to be a freeman of this very borough, that no freeman could be admitted unless on a *vacancy* in the limited number created by *death or disfranchisement*, and that the onus lay on the party claiming the franchise to show that he was admitted on such vacancy created by death or disfranchisement, it may have been considered after such decision, that the entry produced was not *prima facie* evidence. But it is



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also to be observed, that although the Town Clerk was cross-examined, yet it was only for convenience that he was asked what were or were not the entries in the book produced. The book itself was the only legal evidence of what was contained in it. And in *Coulter's Case*, therefore, the very document which he produced as *prima facie* evidence of his being entitled as a freeman by birth, showed that not another instance of an admission in respect of such an alleged right had ever existed in that borough, or at least was to be found in the book on which the claimant relied as evidence of his right; which book, as Counsel has been informed, contained the entries of admission for the last fifty years.

If it shall ever be decided by the Court of Queen's Bench in this country, or the House of Lords, on a *quo warranto* information, that the Corporation of Dublin have no right to admit a freeman by right or by reason of birth, marriage, or service; or if a book be produced by a freeman claiming by birth, marriage, or service, as the evidence of his claim; and if that very same document shew that no other person was ever admitted as a freeman of the Corporation of *Dublin*, by birth, marriage, or service (as the case might be,) it may then be contended, either that the proper tribunal, namely, the Court of Queen's Bench, has decided the question, and that the judgment of *ouster* of the Court of competent Jurisdiction would be sufficient; or that—the same document, which is *evidence* of the *prima facie* case, also *negativizing* that *prima facie* case,—the claimant should be rejected by the Barrister; and that is *Coulter's Case*.

But the above observations, it is submitted, clearly show that it has no application to a case like the present, where the Court of competent jurisdiction, namely, the Court of Queen's Bench, has decided, in *The Queen v. Cowen*, that the Corporation of *Dublin* has a right to create freemen by right or reason of marriage as contrasted with honorary freemen: and where it is notorious that the Corporation of *Dublin* has a right to create freemen by birth or servitude, and which indeed appeared clearly in the case of *The Queen v. Cowen*—a right which, if it be not notorious, it is somewhat singular, has never been questioned by any legal proceeding by way of *quo warranto*, of which Counsel is aware. In fact, there is a statutable recognition of this right in the very old statute of the 15 *Hen. 7, s. 3*, by which it is provided, "that this act extend, nor in any manner wise be prejudicial or hurtfull to any free man of the citie of *Dublin*, *Waterford*, ne of the town of *Drogheda*, being free by birth, or prentishood, or marriage, and dwelling within the said cities and towne."

On the above grounds, it is respectfully submitted that the claimant is entitled to register.\*

\* See the observations of Lord Annally, C. J. in *Rex v. Green*, *Wallace's Reports* by *Lyne*, 28.

## ARGUMENT AGAINST THE CLAIM.

The certificate by the Officer of the Corporation, of the claimant having been admitted as a freeman, on the ground of birth, marriage, or servitude, is only *prima facie* evidence of his right to register as a voter. But the claimant contends that the certificate is conclusive on the Registering Barrister, and that nothing could be allowed to be said in opposition to it. Such a proposition is contrary to justice, to the rights of individuals, to the principles of public policy, the true construction of the Reform Bill, and the cases decided on it.

There is no obligation on corporations to investigate the grounds of claim; and persons may and are constantly admitted to their freedom without any such investigation or inquiry. Every registered voter has an interest in the franchise: the 18th section of the Reform Act gives him the right to protect it by opposing false claims to register. Besides, as all admissions to freedom by a corporation take place behind the back of the party opposing the claim to register, ought he, in justice, to be bound by acts done in his absence, or precluded from showing, if he can, that the alleged ground of admission in the certificate was false? A corporation, in admitting to a freedom on a false ground, may either act corruptly or may have been imposed on. Why should an existing right be bound by either the corrupt or mistaken act of the Corporation? It would be contrary to public policy to give such a power to corporations. The effect of a decision in favour of the Appellant would be, to give corporations the power of putting as many persons upon the registry as they pleased, by admitting them on the alleged but untrue ground of marriage, &c. Many corporations are under the influence of single individuals, whose interest might lead them to act improperly.

The ninth section of the Reform Act expressly disqualifies honorary freemen, admitted since March, 1831; and a person is not the less an honorary freeman because he is admitted on the ground of birth, &c., he having in truth no claim to be so admitted. Why should the registered voter be precluded from showing that the claimant is in substance an honorary freeman, and that the ground of his admission was a false one? Suppose the case of a claimant producing a certificate of admission to freedom by servitude, which is a fact within his own knowledge; and that he admitted before the Registering Barrister that he never served an apprenticeship to any one, and that the allegation in his certificate of his having done so was a falsehood, he would be clearly an honorary freeman, and not entitled to register.

Is the certificate, thus contrary to the admitted truth, to be taken as conclusive on the Registering Barrister? And yet, if the certificate is conclusive, he must put him on the registry, though he is satisfied that the party has no right. There is nothing in the Reform Act to warrant such a con-

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struction, but the Act is directly opposed to it. The 15th section enacts that notice shall be given of the intention to register, stating the nature of the qualification as entitling him to be registered. There is no exception: freemen must, therefore, serve a notice as well as others. *Cui Bono* direct that notice is to be given by freemen, if no one be allowed to question their right to register? The 16th section enacts that the claimant shall establish his right pursuant to his notice; and in case of a person claiming to register from property, he must not only produce his title-deed, but also prove the value. The opponent may clearly controvert the genuineness of the title-deed or the value of the property. Did the legislature intend to give a peculiar boon to freemen? And why should it be held that the claim of the freeman was to be incontrovertible, and the certificate of the corporation officer so strong as to preclude even an inquiry? The seventeenth section enacts that the barrister shall *investigate* the claim and *determine on its validity*; and yet the appellant contends that, in the case of a freeman, there is to be no investigation, and that the barrister, even though convinced of its invalidity, must determine in his favour on the mere production of the certificate.

The seventeenth section also enacts that the barrister shall *examine* and *inquire* as well by the oath of the claimant, as by any other evidence offered in support of, or in opposition to such claim; and yet the appellant's case is, that evidence, either by the oath of the claimant or otherwise, is not even to be admitted in the case of a freeman.

The seventeenth section likewise directs the barrister to inquire into the truth of the particulars required to be stated in the oath to be taken by the claimant; and in schedule No. 9, the oath of a freeman is set out, in which he has to swear that he has a *right* to vote at elections of the city, &c. and yet it is said by the appellant that the barrister is not to inquire into the truth of such right.

The decisions on the Reform Bill are strongly against the appellant. In the case of the *Queen v. Cowen*, *Burton* and *Crampton*, Justices, express their opinion that the Registry Court may inquire into the truth of the ground of admission alleged in the certificate. *Coulter's* case was a decision by the twelve Judges that the certificate was not conclusive, and that the party opposing had a right to go behind the certificate, and show that the Corporation had no power to admit persons to their freedom on the ground of birth, marriage, or servitude. If the certificate may be questioned on one ground, why not upon another equally affecting the validity of the claim? It is said that a proceeding by *quo warranto* is the proper way to try this question. The Court decided in the case of *The Queen v. Cowen*, that such was not the proper course. It is also said, that a committee of the House of Commons can afford redress, and that such is the proper tribunal. But it is doubted whether committees of the House of Commons

have a power to open the registry, and they have frequently refused to do so. But even if the right to do so was clear, is the petition to the House of Commons such a remedy as to induce the Court to pronounce it to be the only one, and would not the Court require express words in the statute to induce them to do so?

As between the Corporation and the claimant, we admit the certificate is conclusive. As between the claimant and the registered voter who opposes him, we do not think it necessary to dispute that the certificate is *prima facie* evidence; but we respectfully contend that it is not conclusive, and that it is competent for the opponent to show, if he can, by the admissions of the claimant or by other evidence, that the claimant is nothing more than an honorary freeman. The contrary doctrine would enable every corporation in Ireland to swamp the constituency of property; and by merely giving certificates containing false allegations, enable them to fill the registry books with the names of persons, who being nothing more than honorary freemen, are expressly, by the 9th Section of the Reform Act, declared not to be entitled to vote. In the cases of *Carolin* and *Hyde*, decided by the late Chief Baron, the question raised on the present appeal did not occur, and those cases are no authority in favour of the appellant.

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*Saturday, 9th February, 1839.*

The CHIEF JUSTICE having reserved the question for the consideration of the twelve Judges, on this day announced, that their Lordships were unanimously of opinion, that the Registering Barrister had decided correctly; that the production of the certificate was not conclusive; that the Registering Barrister was warranted in questioning the claimant; and that the latter having declined to answer any questions touching the validity of his admission, the Barrister was fully justified in refusing to admit him on the books of the Registry.

Rejection affirmed.

## COMMON PLEAS.

HILARY TERM, 1839.

Thursday, 24th January.

PRACTICE—SETTING ASIDE REGULAR JUDGMENT—  
REPLEVIN.

RYAN in Replevin v. FRANCIS and others.

The Court will set aside a regular judgment, where a party by a fatality has been prevented pleading in time; and although the time for pleading had been previously enlarged.

Mr. JAMES H. BLAKE, Q.C., applied on behalf of the defendant, to set aside the judgment marked in this cause on the 29th of November last. In consequence of the illness of her attorney on the 21st, she applied for four days further time to plead; and during that period, Mr. M'Namara her attorney, died on the 16th of January. She appointed another attorney and filed pleas in bar, thinking that the judgment had not been marked. She did not know of it, till she was served with the writ of inquiry for the 27th instant. Never received any notice till then. She swears positively as to that, and says as to the merits, that she *has a legal and just defence on the merits, as she is advised and believes*—meaning that she has a just defence, and as she is advised and believes, a legal case on the merits.

Mr. H. Martly, for plaintiff.—The simple question here to be decided by the Court is, whether they will now set aside this judgment, which is regular in every respect. There was ample time to have pleaded, for the rule for judgment was not entered for some days after we were entitled to it. The avowries were filed on the 8th of June. They let the whole of the vacation pass, and not till sixteen days after our judgment was marked do they file their pleas in bar; two pleas *nontenuit and riens* in arrear. The affidavit of merits is quite insufficient—it satisfies no one of the rules that have been laid down with regard to such affidavits.

CHIEF JUSTICE DOHERTY.—We cannot in this case apply the strict rules with regard to the affidavits; there is a fatality occurring of her attorney dying; and although the affidavit of merits is defective, still we think that the judgment ought to be set aside.

Mr. J. H. Blake.—We will go to trial at the sittings after this term.

Mr. Martly.—They affixed no terms by their notice, and we are therefore entitled to the costs.

*Per Curiam*.—Let the judgment be set aside on paying the costs of marking the judgment, and of this motion.

## QUEEN'S BENCH.

DEMURRER—EFFECT OF PLEADING OVER—ACTION ON  
REPLEVIN BOND.

IGOE v. O HARA.\*

DEMURRER. This was an action in debt, brought by the plaintiff, as assignee of the sheriff of Kildare, upon a replevin bond.

The declaration stated, that, on a day mentioned, certain goods and chattels were in the possession of the plaintiff, and being so in his possession, one Somers sued out of Chancery certain writs of replevin, directed to the sheriff, and that thereupon the sheriff, according to the form of the statute, &c., took from Somers, the defendant, and another, their joint and several bond, conditioned for the said Somers appearing in the Court of Common Pleas, in the then next term, and prosecuting his action in replevin *with effect*, and *without delay*, against the plaintiff for taking of the goods, and for a return thereof, if return thereof should be adjudged. That thereupon the sheriff replevied the goods. That the said Somers, in the then next term, appeared and declared against the plaintiff in this action, who pleaded *non cepit*. That the said Somers afterwards entered a *nolle prosequi*, upon which judgment was entered for the plaintiff in this present action, being the defendant in the replevin suit. There was then an allegation, that Somers did not prosecute his suit with effect, whereby the bond became forfeited, and that the sheriff afterwards duly assigned the said bond to the plaintiff, according to the form of the statute, &c., whereby an action accrued. To this declaration the defendant pleaded, 1st, *Non est factum*. 2dly, That the sheriff did not assign *modo et formâ*. 3dly, That Somers did prosecute his said replevin suit in the declaration and bond mentioned, *without delay*, and that final judgment was had thereon as soon as same could have been obtained, according to the course or practice of proceeding in the Court of Common Pleas: and 4thly, That the said Somers did prosecute his action of replevin against plaintiff *without delay*. To the two last pleas plaintiff demurred generally, and setting out, as special cause, that those pleas did not state Somers to have prosecuted his suit *with effect*.

Joinder in demurrer.

Where, upon an action by the assignee of a bond, executed in pursuance of a writ of replevin issuing out of Chancery, the declaration stated that the condition of the bond was to prosecute the suit "with effect and without delay," and the defendant pleaded that he did prosecute the suit "without delay;" upon demurrer to the defendant's pleas, it was admitted that they were bad, but it was objected that the declaration was also bad on general demurrer, for not stating that the bond was executed upon a distress for rent; *Held*, that the defect in the declaration was cured by the implied admissions in the defendant's pleas of the plaintiff's right to sue.

\* This case was argued in Michaelmas Term.

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Mr. *Bland*, with whom was Mr. *Martley*, Q.C., for the plaintiff, contended that the pleas were bad, as not answering the conditions of the bond declared on, which, being to prosecute the replevin suit, and make return, were separate and distinct conditions. *Morgan v. Griffith* (a). That the breach of any one was sufficient. *Vaughan v. Morris* (b); *Dias v. Trueman* (c); *Gwillim v. Holbrook* (d); and that the legal meaning of prosecuting *with effect* was prosecuting with success. *Turner v. Turner* (e); *Perreau v. Pevan* (f).

Mr. *West*, Q. C., and Mr. *Monahan*, for the defendant, admitted that the pleas were bad, but fell back upon the declaration, which, they contended, was bad on general demurrer, it not appearing on the face of that pleading, that the sheriff was authorised to take the bond declared on, or to make an assignment of it, which could only be under 36 G. 3, c. 38, corresponding with the English statute, 11 G. 2, c. 19, or 8 G. 1, c. 6, ss. 5 & 4. The 36 G. 3, c. 38, was expressly confined to distresses for rent, and not to any other species of replevin; so that the omission in the declaration, in this case, of an averment of a distress for rent, is fatal, unless it could be brought within the 8 G. 1, which, although applying to all replevins, yet only enabled seneschals and officers of inferior courts entitled to grant replevins, to take a bond from sureties for prosecuting the suit, and to make returns (the words, *with effect*, and *without delay*, being peculiar to the 36 G. 3,) and to assign the same, and did not extend to replevins in pursuance of a writ from Chancery. This question, whether such a bond as the one declared on is assignable, under the 8 G. 1, c. 6, though touched on in *Caithness v. Murphy* (g), was not decided by this court.

Mr. *Martley* replied, and contended that the judgment should be for the plaintiff: first, on the ground that the defendant, from having pleaded over, and, from the manner of so pleading, had cured any defect there might have been in the declaration, and to raise the question sought on the other side, the defendant should have demurred specially; but that, as the record now stood, the court should presume that there was a distress for rent, as there was no averment in the declaration that there was no such distress; and further, that there was nothing inconsistent with there having been such distress. The declaration stated the taking of a bond, according to the form of the statute, and the plea is not that there was no distress, but impliedly admits it, as it is in effect, a plea of perform-

(a) 7 Mod. 380.

(l) Cas. Temp. Hard. 137.

(c) 5 T. R. 195.

(d) 1 B. &amp; Pol. 410.

(e) 2 B. &amp; Bing. 107.

(f) 5 B. &amp; C. 284; S. C. 8 D. &amp; R. 72.

(g) 1 Sm. &amp; B. 1.

ance.—[BURTON, J. Suppose an action brought on a common bond, by a person claiming as assignee, and that the defendant pleaded performance, would that entitle the plaintiff to judgment?—In the case put by the court, no state of facts would give the plaintiff a right to sue here. There is, by implication, a good bond and assignment, referring to a statute authorising such, and the court, where a party pleads over, will make such intendment as will support the pleading. *Vivian v. Shipping* (a); *Glasscock v. Morgan* (b); *Fletcher v. Pogson* (c).—[CRAMPTON, J. There is another case, *Cox v. Nash* (d), as to the effect of pleading over. There, pleas, which would have been bad, if demurred to, were held to have been cured by the replication.]—Secondly, even supposing that it cannot be presumed that there has been a distress for rent, so as to bring the case within the 36 G. 3, yet it is one clearly within the 8 G. 1, c. 6, which has been held by this court, in *Harding v. Lyhane* (e), to be a remedial act, and, as such, should receive a liberal construction. That case decides, that in cases of replevin by plaint, sheriffs are within the 8 G. 1, c. 6, although not expressly named; and the case of *Caithness v. Murphy* (f) decides that the words sheriffs and other officers having authority to grant replevins extends to the case of a sheriff replevying goods, under a writ of replevin out of Chancery. As to the bond containing the words, “with effect and without delay,” being more than that act requires, it has been held, the sheriff taking a bond for more than required by the statute will not vitiate the bond. *Caithness v. Murphy*; *Short v. Hubbard* (g).

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Tuesday, January, 29th.

BURTON, J., this day delivered the judgment of the court.—This is an action by the assignee of a replevin bond, by virtue of a writ issuing out of the Court of Chancery, and the defendant is one of the sureties to that bond. The defendant pleaded four pleas; 1st, a plea of *non est factum*: 2d, that the plaintiff was not assignee, and these pleas concluded to the country, and issue was joined thereon; but no question has arisen upon them in the present argument. To the other two pleas demurrers have been taken, and it is admitted that they are demurrable, but, then, the defendant insists that the declaration is bad upon general demurrer, and it is upon this the entire question depends. The plaintiff sues as assignee of the sheriff, under a statute in force in Ireland, and which vests bonds in the assignee; and the mis-pleading, alleged

(a) Cro. Car. 184.

(b) Cro. Car. 184.

(c) 3 B. &amp; C. 192.

(d) 2 Moo. &amp; S. 434.

(e) 2 Fox &amp; S. 160.

(f) 1 Sm. &amp; B. 1.

(g) 2 Bing. 349.



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as an objection to the plaintiff's succeeding in the action, is, that it is not alleged that the distress was a distress for rent. In order to sustain such an objection now, it must be one which would be a good ground of general demurrer to the declaration; and the objection in the present case is this, that the bond executed was upon a replevin, under the 36 G. 3, c. 38, which directs bonds to be taken upon distresses for rent, and vests the legal right in them in the assignee; and that, therefore, the assignment of it could be valid only if taken for a distress for rent, and the plaintiff was bound to make such an averment in his declaration, which he has omitted to do in the present case. One answer to this has been, that this is not a ground of general demurrer, and only a ground of special demurrer, being merely matter of form. It is not necessary to decide this point, but it appears to us to be matter of substance, and that if this declaration had been demurred to, it might be demurred to generally. It has been urged, that this is a good declaration under the 8 G. 1, c. 6, which directs and authorises taking replevin bonds in all cases; the question came before us, in the case of *Caitness v. Murphy*, whether that act extended to Chancery replevins, or only to those issuing out of inferior courts, and the court did not then give any opinion upon that question, nor is it necessary to decide it now. It appears to me, to be a declaration upon a replevin bond, as clearly under 36 G. 3, c. 38, as if it stated it was so, but neither upon this is it necessary to give an opinion, as it does not interfere with the principle upon which we decide this case, which is, that although this might be ground for general demurrer, it may have been cured by pleading over. The 3d and 4th pleas cured the defect, by an implied admission, that the plaintiff was the assignee of the sheriff. The condition of the bond was, to prosecute the suit "with effect, and without delay;" the plea stated, that he did prosecute, &c., "without delay," and was therefore bad; but there is a direct authority to shew, that when a plea of that kind is put in, to a declaration which states that plaintiff is assignee according to the statute, &c., and the defendant does not deny that, but insists upon something as an answer to the declaration, and states performance, he admits the party's right to sue, and cannot afterwards take advantage of the omission of an averment like that in the present case. The case of *Beale v. Simpson (a)* is quite in point with the present. The present case is rather stronger, as in the former the plea was to a collateral matter.

Judgment for the plaintiff.

(a) 1 Lutw. 632.

*Friday, January 25th.*

**PRACTICE—AMENDMENT OF DECLARATION—  
ATTORNEY'S NAME.**

**LINDSAY v. VAUGHAN.**

Mr. NELSON moved to amend a declaration, without prejudice to the rules to plead. The declaration was filed three days ago, no copy had been taken out, and notice of this motion had been served upon the defendant's attorney. The amendment sought was to attach the attorney's name to the declaration, which has been omitted by mistake. In *Jamieson v. Dunkin* (a), the counsel's name was omitted, and an amendment was allowed on the same terms.

The court will allow a declaration to be amended, by attaching the attorney's name to it, without prejudice to the rules to plead.

PERRIN, J.—The authority is with you; you may therefore amend.  
Motion granted (b).

(a) Batty, 474.

(b) See next case.

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*Friday, January 25th.*

**PRACTICE—AMENDMENT OF DECLARATION—  
COUNSEL'S NAME.**

**KEENE v. GRAHAM.**

In this case there was a notice of motion, on behalf of the defendant, for an order to take the declaration off the file, there being no counsel's name signed to it; and a notice, on behalf of the plaintiff, for leave to amend, the omission having occurred by a mistake of the clerk. The declaration was filed on the 22d of January, and the defendant's notice served on the 23d.

Mr. Joy, for the defendant, submitted that this declaration was a nullity, and should be taken off the file. If it was a plea, the plaintiff might allow the time for pleading to pass, and mark judgment as for want of a plea. The plaintiff has entered the rules to plead to a declaration which is a nullity, which is clearly irregular.

The court will allow a declaration to be amended, by putting the signature of counsel to it, where it has been omitted by mistake, without costs, and without prejudice to the rules to plead, altho' a motion is made to take it off the file for irregularity.

Mr. Nelson contended that the defendant had suffered no expense or inconvenience. The declaration contained a count upon a bill of ex-

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change, and the money counts, and there could be no doubt about the plea. The case of *Jameson v. Dunkin* (a) was directly in point.

PERRIN, J.—Were you, Mr. Joy, at any costs before you served your notice of motion?

Mr. Joy was not aware that any costs had been incurred at that time. The case of *Jameson v. Dunkin* was not argued.

*Per Curiam*.—Let the plaintiff be at liberty to amend, without costs, and without prejudice to the rules to plead.

Leave given to amend.

(a) Batty, 474

Saturday, January 26th.

### PRACTICE—SUBSTITUTION OF SERVICE—EJECTMENT FOR NON-PAYMENT OF RENT.

Lessee of BARCLAY and GUMLEY v. the Casual Ejector.

The court will deem the service of an ejectment for non-payment of rent, in Dublin, good service, the same having been posted on the premises, where all the parties to be served cannot be discovered, and every person interested, who could be discovered, was served, and also a receiver appointed at the instance of a mortgagee of the lease sought to be evicted, but the residence of the parties in Dublin must be negatived in the affidavit.

Mr. CALLAGHAN applied, on a former day, that the service of the summons in ejectment in this case should be deemed good service. The ejectment was brought for non-payment of rent. The lessor of the plaintiff was the mortgagee of the tenant's lessor, and a receiver had been appointed by the Court of Chancery, at the instance of a mortgagee of the lease sought to be evicted. The affidavit of the process-server stated, "that the premises for which the ejectment was brought were situate on George's-quay, in the city of Dublin, and were in a ruinous and dilapidated condition, and that they had been presented as a nuisance by the City Grand Jury; that he had served the receiver, and several of the tenants who claim an interest in the premises, personally; that he served the tenant against whom the application was made, by posting the ejectment on the premises, but that he could not discover the residences of these parties, although he made every exertion in his power to discover them, and that they have no beneficial interest in the premises."

CRAMPTON, J.—The affidavit is insufficient, in not stating, particularly,

negatived, and the exertions made to discover them particularly stated

what exertions the process-server had made; and also, in not negating the fact that parties were resident in the city of Dublin.

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Mr. *Callaghan* renewed his application this day, upon an amended affidavit, in which the process-server stated, "that before the posting of the ejectments in this case, he went to John Dunne, of Wicklow-street, in the city of Dublin, who is one of the tenants of the premises, and the husband of one of the daughters of the lessee in the lease sought to be evicted, and having served said Dunne, inquired of him the residences of the respective tenants; that Dunne informed him of the residences of the other parties, but stated that he could not inform him where the parties in question resided, although he had been previously well acquainted with them; and that he, Dunne, did not think they were resident in Dublin, or in Ireland, as he must have known it, if such were the fact." In the case of *Lessee of Hime v. the Casual Ejector* (a), this court granted a similar application.

*Per Curiam*.—Let the service already had be deemed good service, upon posting this order on the premises, and serving the receiver with the same.

Motion granted.

(a) 6 Law Rec. N. S. 239.

Wednesday, January 30th.

## PRACTICE—EJECTMENT ON THE TITLE—CHANGING THE VENUE.

*Lessee of JACKSON v. LODGE.*

This was a motion to change the venue from the Queen's county, to the county of Kilkenny. It appeared from the affidavits on behalf of the lessor of the plaintiff, that this was an action of ejectment upon the title, as of Easter Term, 1837, for the lands of Graigavoice, late in the possession of Elizabeth Lodge, situate in the barony of Upper Ossory, in the Queen's county; that the said Elizabeth was seized, in her own right, as of her paternal estate of these lands, by virtue of a lease of lives renewable for ever; that in 1802, she married F. R. Jackson, who died in 1816, leaving her surviving, and leaving issue of said marriage; that in 1810 a fine was levied, and a deed executed of the same

The court will not change the venue in an action of ejectment on the title, where there have been two verdicts for the defendant in a previous ejectment about the same lands in which he was the lessor of the plaintiff, upon the county in

the grounds of prejudice prevailing in his favor amongst the jurors of which the lands are situated.

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date, whereby the fine was to enure to the use of the husband, for life and in case said Elizabeth survived him, then to her use for life, and then to the use of the said F. R. Jackson, his heirs and assigns for ever; that in 1816, said Elizabeth married one Oliver Lodge, and died in 1831, leaving him surviving, but without any issue of said marriage; that the lessor of the plaintiff is the nephew and heir-at-law of said F. R. Jackson, and as such, if the deed of 1810 were executed, claims to be entitled to these lands, and if said deed was not executed, the defendant claims to be entitled to them, as the heir-at-law of Elizabeth Lodge; that as of Easter Term, 1836, an ejectment was brought on the demise of the present defendant, and in which ejectment the present lessor was a defendant, and a verdict obtained by the plaintiff; that a new trial was afterwards granted, but by consent the issue has narrowed to this, whether the deed of 1810, declaring the uses of the fine, was duly executed by the said Elizabeth or not? That there existed among the jurors of the Queen's county a very strong prejudice, in favor of the defendant, partly caused by the former verdicts, and partly because the present lessor was an utter stranger in the county, and the defendant being an influential person in it, and having a large connexion there; that at the Spring Assizes of 1837, a special jury found a verdict against the deed of 1810, notwithstanding a great body of secondary evidence was produced to prove its genuineness; that afterwards the Court of Exchequer refused a motion for a new trial; that, besides the prejudice which exists against the present lessor in the Queen's county, and which renders it almost impossible to have a fair trial therein, such prejudice has been increased by reason of the two verdicts already had, and that the greater number if not all the witnesses, reside near and about the county of Kilkenny.

The affidavit of the defendant merely stated the evidence which was produced on the trial, to throw suspicion upon the deed of 1810, and denied that the deed was executed by Elizabeth, that he tampered with the jurors, or that he knew more than two or three of them, and also, the existence of a prejudice in his favor amongst the jurors of the county.

Mr. *Radcliffe*, with whom was Mr. *Moore*, Q.C., for the lessor of the plaintiff, relied upon the statements in the affidavits in support of the motion. If there be reasonable cause to suspect that justice will not be impartially administered in the county in which the venue is laid, the court will award a *venire* to an adjoining county, *Rex v. Hunt (a)*. In a case similar to the present, the venue was changed upon the grounds of the existence of political feeling amongst the jurors, which created a

(a) 3 B. & Ald. 444, S. C.; 2 Chitty 130.

prejudice in their minds against the lessor of the plaintiff, *Dowdall v. Dowdall* (a).

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Messrs. *Murtley*, Q. C., and *R. Walker*, *contra*.—The suggestion in *Hunt's* case was, that a fair trial could not be had, and the *venire* was not upon a mere suspicion, that impartial justice would not be done. In *Dowdall v. Dowdall* there had been three trials, and no verdict: and this arose from political feeling. In the present case there have been two trials and both the same way, and the court refused to disturb the last verdict.—[CRAMPTON, J. In a late case in which the venue was changed, *Atkinson v. M'Carthy* (b), there were three trials also, and no verdict.]—In the case of *Lessee of Keon v. Keon* also, in which the verdict was changed, there were two trials by special jurors, and neither could agree, and there were very strong feelings on both sides about certain suppositious children. But there is no case similar to the present, in which two trials have been had the same way, and in a local action, and when the issue is narrowed to the simple inquiry, as to the genuineness of a deed, the court will not make such a precedent, upon general and sweeping imputations upon the gentlemen of the entire county.

Mr. *Moore*, Q. C., replied.—The property in question was the estate of Mrs. Elizabeth Jackson. In 1810, she and her husband levied a fine, and in the same year the deed in question is prepared, and Jackson lived five years after he executed this deed; all of which circumstances are calculated to excite a strong impression that the deed is genuine. Where there is an apparent case in favor of the lessor of the plaintiff, and where there have been two verdicts already against him, and a strong impression on his mind, that a prejudice exists in the minds of the jury in favor of the defendant, a *venire* ought to go to another county, unless it would cause great inconvenience to the opposite party. In the present case that objection cannot arise, for the witnesses reside nearer to Kilkenny than to Maryborough. We are willing to have the case tried in any county in Ireland, but the Queen's county.

*Per Curiam*.—There is no ground for the motion, and it must be Refused with costs (c).

(a) 1 Law Rec. 355.

(b) Not reported.

(c) See *O'Shaughnessy v. Lambert*, 1 Law Rec., 3d Ser. 104.

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*Tuesday 15th, and Friday, 18th January.*

## LOCAL ASSESSMENTS—CONSTRUCTION OF ACT OF PARLIAMENT.

TOMB v. The Commissioners of Police, Belfast.

TRESPASS for taking the plaintiff's goods.—This case came on for trial at the last Summer Assizes for the county of Antrim, before BURTON, J., when a bill of exceptions was taken by the defendants, from which it appeared that the plaintiff gave in evidence a warrant signed by two magistrates of the county of Antrim, authorising the collector of taxes under the Belfast Police acts, to seize the plaintiff's goods for the sum of £232. 10s., being the valuation and applotment the plaintiff was charged with for the police rate upon tenements and premises, situate at Donegal-quay, and Richey's Dock, in said town of Belfast, for the year 1836, and which the plaintiff, although required, neglected to pay; that the collector seized a chair in the dwelling-house of the plaintiff; that this seizure was made by an arrangement between the plaintiff and the defendants' agent, in order to raise the question whether the plaintiff's quays were rateable or not. It appeared that the plaintiff had paid the rate for former years, and that the quays were lighted, watched and cleansed. The commissioners' book, which was a fair transcript of the valuator's book for the year 1836, was given in evidence containing the following entry:—

| Persons Assessed. | Tenement. | Value. | Tax due for 1836. |
|-------------------|-----------|--------|-------------------|
| Henry Joy Tomb.   | Quayage.  | £1550. | £232. 10s. 0d.    |

"The above is the valuation of the plaintiff's quays." The occupiers of the houses which run along the quay paid police rates. It was also proved, that the valuation of the quay was ascertained from the statements made to the valutors by the persons who rented births for their vessels along the quays, and that the quayage he made was the value to be assessed for the rate; and to this evidence the defendants' counsel took an exception. The evidence upon the part of the defendants went merely to shew that their proceedings with respect to the rate, and also the distress, were regular; and having done this, counsel on their behalf called upon the learned Judge to direct the jury, that if they believed the evidence on the part of the defendants they should find a verdict for them, but he declined doing so, and told them if they believed the evidence they should find a verdict for the plaintiff; and to this direction defendants' counsel took another exception. The jury found a verdict for the plaintiff.

The rate is levied under 40 G. 3, c. 37, and 56 G. 3, c.—and the question in the case was, whether the plaintiff's quays were rateable

By an act of parliament a power was given to certain commissioners, &c., to levy rates for cleansing, lighting &c. the town of B., and the valutors were to value "the several messuages, tenements, houses, buildings and hereditaments" and the persons to be assessed were "all and every person who should rent or occupy within said town any messuage, house, tenement or other hereditament" and in case of removal same were to be rated proportionably for "such messuage, house, warehouse, shop, cellar, vault, stable, coach house, brew house, granary, malt-house, building, garden, land, tenement or hereditament"; *Held* that a person who derived quayage from a quay in the town was not rateable in respect of the quay or the quayage derived therefrom.

upon the construction of these acts : by the 18th section of the first of these acts, the commissioners were empowered to rate "all and every person or persons who shall inhabit, hold, use, occupy, possess, or enjoy, any land, ground, house, lodging, shop, *wharf*, warehouse, coach-house, stable, cellar, vault, building, counting-house, or place of carrying on business, either in co-partnership or otherwise, or hereditaments whatsoever, within the said town of *Belfast*, &c., according to the ability of such person respectively, for the purposes of *paving, cleaning, lighting* and *improving* the several streets, lanes and other places within the same ;" and by the 64th section, the commissioners were allowed in any action brought against them to plead the general issue and give special matter in evidence. By the second act, so much of the former act as related to the making of the rate is repealed ; and the 6th section enacts that the commissioners should appoint valuers of the "several messuages, tenements, houses, buildings, and hereditaments," within said town, &c., "now built or hereafter to be built ;" and in the 9th section it is enacted, that the appointment shall be made upon "all and every person or persons who shall rent or occupy, within the said town, &c., any messuage, tenement, building or other hereditaments," according to the value of the same ; and it is provided "where any person shall hold, occupy or enjoy any stores, storehouse, manufactory, provision-yard, timber-yard, or other yard of business or trade whatsoever separately and apart from his or her dwelling-house, the valuers shall assess, &c., separately and not conjointly with such dwelling-house : and the committee appointed by the act were to assess "all such messuages, tenements, houses, buildings and other hereditaments and premises," and by the 16th section, in case of removal, the person to be rated in proportion to the time such person shall occupy the same, in the same manner as if he or she had been originally rated and assessed "for such messuage, house, warehouse, shop, cellar, vault, stable, coach-house, brew-house, granary, malt-house, building, garden, land, tenement or hereditament." And it further enacts, that if "any goods &c., shall be left on any quay or quays within the said town, &c., for &c., it shall be lawful for the commissioners to carry same to any yard or warehouse at the expense of the defaulter ;" and the valuers were sworn to make a return "of the valuation of all messuages, tenements, buildings and hereditaments within the said town."

Mr. *Napier*, with whom was Mr. *McDonnell*, Q.C., and Mr. *Whiteside*, on behalf of the defendants.—The question is, whether the plaintiff's quays are, or are not liable to this rate ; and the distress was made and the action brought in consequence of an arrangement made with the plaintiff's agent to try this question. By the first of these acts, the rate imposed upon each inhabitant did not depend upon the property he possessed in the town, but upon the general ability of each person to contribute to the rate. By the following act that principle was altered, and the rate imposed upon each person was regulated by the value of

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his property in the town; and the principle adopted in this act appears to be, that the property which is benefited by the rate should contribute proportionably. The words in the oath taken by the valuers are most general, and include all property in the town which could derive a benefit from the rate. Then the enumeration in the proviso, as to the rate in case of change of residence, shews that all these things were included in the general words "messuages, tenements, buildings, and hereditaments," and "quay" is included in the words "land, tenement, and hereditament." The word "building" cannot limit the application of the general words, because a "garden" is not included in building, yet, it is rateable, and included in the general words. Suppose this were pasture, and not a quay, the word "land" would clearly include it. [CRAMPTON, J. It is not the quay, but the incorporeal hereditament arising out of it, that appears to have been rated, namely, the quayage.] The next paragraph of the bill of exceptions furnishes an answer to the quoyage in the preceding one, that the above was the valuation of the plaintiff's quays, amounting to £1550. That value was ascertained by the profits derived from them; the word quoyage was inserted by mistake, being the measure of the value, and not the value of the quays. It was at most a mere informality, and no informality would give a right to maintain this action, where the commissioners had jurisdiction, and the question comes again to this, whether the commissioners had jurisdiction to rate "quays" at all? and not the manner in which they did it.—[BUSHE, C. J. Would your argument go to this, that a dock could be rated under these acts?—If a dock were over plaintiff's land, it would certainly be liable. If a garden were there, it would be liable to rate. The commissioners light, cleanse and remove obstructions from the plaintiff's quays, and for these benefits he is bound to contribute to the rate. The word "land" is sufficient to include this case; whatever includes a possessory interest in the soil is included in the word land. *Dickinson's Qr. Sessions by Talfourd*, and the judgment of Mr. Justice Tyndall, in *Brown v. Lord Granville* (a), shews how the court will seize on a word in the act, in order to bring things within it which are not mentioned as rateable. In *Rex v. Hull Dock Company* (b), a dock was held properly liable to rate, although not mentioned, and in *Rex v. Mayor of London* (c), a barge-way was held liable to rate; and in that case Lord Kenyon says, "the rate is not imposed upon the tolls but on the barge-way."

What is quoyage? It is not an easement, but the profit derived from the local situation of the quay, and a measure of the value of the quay. The parties having arranged to try the question, whether or not the quay is rateable, the plaintiff is concluded by that arrangement, and cannot now raise any question upon the word quoyage.

Any uncertainty in the name or description of property is matter of

(a) Moo. & Sc. 453.

(b) 1 T. R. 219.

(c) 4 T. R. 21.

appeal, *Rex v. Wilson (a)*, and in that way the plaintiff might have raised this question, if he had done so in proper time, but if a party pretermits his appeal, his case then is as if he had appealed, and had a decision against him. In *Rex v. Ellis (b)*, the lessee of a fishery was held liable to rate, although, in their judgments, the Judges express a doubt whether what was rated was or was not an incorporeal hereditament; but the rate having been imposed at sessions, they upheld that decision.

Messrs. *Holmes and Joy, contra*, with whom was Mr. *Gilmore*, Q. C. The cases cited do not apply; they are poor law cases; and the principle upon which poor rates are apportioned has been laid down in *Rex v. Manchester Water Works Company (c)*, *Rex v. Jones (d)*. The defendants, by electing to plead the general issue, and give the special matter in evidence, can rely upon nothing in evidence which they could not plead specially; and they are bound to make out a complete justification for the seizure of the plaintiff's goods, which is *prima facie* wrong. It is clear, upon the evidence, that the rate in this case is imposed upon an incorporeal hereditament. It is laid upon monies which the plaintiff received from the captains of vessels which moored at a certain quay, and upon nothing else. The proper evidence of the assessment is derived from the books of the defendants, and there the assessment is made upon "quayage." If it be said the quays are rated as being the property of the plaintiff, they were bound to call upon the Judge to leave the question of property to the jury. It is consistent with the possession of this property being in the Earl of Donegal, or in the Crown, that the plaintiff should receive these monies as quayage, by virtue of a grant from either. The distinction between the words quay and quayage is well known in the law; the former means a place, the latter, monies received at such a place. *Spellman's Glossary*, *T. Kaia*, or *Kaiagium*; *Cowen's Interpreter*, and *Blount's Law Dictionary*, *T. Kay* and *Kayage*. It is admitted they could not assess rent, and this is nothing but rent. They are bound to shew that quayage is a tenement within the meaning of the act. The word tenement may comprehend an incorporeal hereditament, and if they can shew that they can assess an incorporeal hereditament, this assessment is warranted. But, although the word tenement may have this extensive meaning, its signification may be limited by the way it is used, and the *juxta* position in which it is found. Quayage, as an incorporeal hereditament, does not come within the act.—[CRAMPTON, J. Mr. *Napier* admitted that an incorporeal hereditament could not be rated, but that it was the solid quay which was rated.]—There is no proof of the property being his, nor was the question of property left to the jury; and the word which they have used in their own book, to describe the

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(a) 5 Nev. & M. 119.

(b) 1 M. & Sel. 652, 664.

(c) 3 D. & Ry 20, S. C. 1 B. & C. 650.

(d) 8 East, 451.

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property rated, has a legal signification totally different from the solid quay. In the first and second sections of the last act, the several species of property mentioned in the first act are enumerated, and amongst these the word *wharf* occurs, and then that part of the first act is expressly repealed. The 6th section states the property to be valued, and in the 9th section the same words are used. If the act stopped here, quayage could not be rated. In the 16th section fourteen different kinds of property are enumerated, and quay is not among them, nor the word *wharf*, which occurred in the former act. By the 13th section, the property was to be rated in certain proportions, and the "tenants and occupiers" thereof were required to pay the rate. This section, as well as the section providing for change of residence, clearly points to an occupation quite different from any occupation which the plaintiff could have of this public quay. "Land," although a very comprehensive term, was never meant to include a quay. The quay does not differ from any other street; and where land is coupled with other terms, *noscitur a sociis* is a sound rule of interpretation. It must be clearly shewn that quay is within the meaning of the act. In *Rex v. Moseley (a)*, this question was decided. In that case, the act under which the rate was imposed was fully as comprehensive as the act upon which the present question arises; and there, the lord of the manor, receiving tolls from parties who had stalls in the street, was held not to be rateable. In *Colebrook v. Tickell (b)*, a rate was imposed upon any person who should inhabit or hold "any land, house, shop, warehouse, or other building, tenement, or hereditament;" and the court held, that an incorporeal hereditament was not included within these words. The court held, in that case, that the hereditament included should be *ejusdem generis* with the things specified. And so in this case, although the words of the act here may be comprehensive enough to include the rate in the present case, still these words must be restricted by the same rule. The property rated must be distinctly specified. *Rex v. the Undertakers of the Aire and Calder Navigation Company (c)*. And where the defendants state, in a document which they are bound to make and keep, that they assessed the plaintiff for quayage, and again adopt that expression in their bill of exceptions, they are concluded by it, and they cannot now say they rated any thing but quayage.

Mr. *Whiteside* replied.—As to the question of occupancy, the plaintiff paid the rate for several years; and, also, the receipt of the quayage is occupancy. Mr. *Holmes* contends, that the occupation contemplated by the act is residence; but that is futile, as persons do not reside in a garden, a stable, a vault, or a warehouse; yet they are all unquestionably rateable; but the occupancy really meant is one which would give a right to occupy. As to the argument, that quayage, being merely an incorporeal hereditament, is not therefore rateable, the case of *Rex v. Calder*

(a) 3 D. &amp; Ry. 385. ; S. C. 2 B. &amp; C. 226.

(b) 6 Nev. &amp; M. 483 S. C. 4 Ad. &amp; E. 916.

(c) 2 B. &amp; C. 713

*Navigation Company* (a) is an answer. In that case, Abbott, J., says, "At the time of passing this act, tolls were considered *eo nomine* rateable; but I can find no instance in which the tolls having been rated, the land has also been rated in respect of any other profit. The oldest case upon this subject is the case of *Rex v. Wickham* (b). There, the market-place was the thing rateable, and the tolls were the measure of its value. The rate, however, in that case, was imposed upon the tolls. In *Rex v. Carrington* (c), the rate was also imposed upon the tolls, although the sluice where they were receivable was the property rateable. Then if, as appears from these cases, by the word tolls may be meant the thing in respect of which the tolls are received, the exemption of tolls by the legislature must be considered as an exemption of that in respect of which they are receivable." A rate on the profits of the land is a rate on the land itself; and if the act here had excepted tolls and profits the land would be free. The case of *Rex v. Mayor of London* (d) shews, that a barge-way is occupied by him who derives profit from it; and in that case, Lord Kenyon says, it was occupied in the only way in which it could be occupied. It is contended that these are poor law cases, and the case of *Rex v. Manchester and Salford Company* is cited as an authority against us; but the word "land" was omitted from the act under which the rate in that case was levied. The language of the 43d of *Eliz.* was not followed, while, in the act upon which the present question arises, the terms "lands, tenements, and hereditaments" occur in the different sections. The omission of this word is the ground upon which Mr. Justice Bayley gives his judgment; so also in *Rex v. Moseley* (e); and if these cases rest on the omission of the word "land," from the acts under which they were decided, surely they are no authority on the present question, where that word is to be found in almost every section; nor do they give any answer to the cases we have cited. No answer has been given to the case of *Rex v. Ellis*. If the party has property which is rateable, trespass will not lie for misdescription; and if the quays here are rateable, describing the property rated as quayage is merely misdescription, for which the party might appeal, but cannot maintain trespass. *Marshall v. Pitman* (f); *Rex v. Calder Navigation Company*. And if the proper course was to appeal, and the party does not do so, he cannot afterwards maintain trespass. *Rex v. Kent Water-works Company* (g); *Hutchins v. Chambers* (h); *Durant v. Boys* (i). The plaintiff might maintain an action of trespass if any person erected any obstruction upon the quay; and, at all events, he has concluded himself, by calling the quay his, and by the admission he made in the arrangement he entered into to try this question, from raising any objection but this, that his quays are not included within the property made liable to the rate by this act: and which objection, we contend, is untenable, being clearly within

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(a) 1 B. &amp; Al. 263, 268,

(d) 4 T. R. 21.

(g) 7 B. &amp; C. 514, 338.

(b) 3 Keb. 540.

(e) 2 B. C. 226.

(h) 1 Bur. 590.

(c) Cowp. 581.

(f) 2 Moo. &amp; Sc. 745.

(i) 6 T. R. 590.

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the words "lands, tenements, and hereditaments," and, being property within the town of Belfast, benefited by this rate.

Thursday, January 31st.

BUSHE, C. J.—This case came before us upon a bill of exceptions.—[His Lordship here stated the pleadings.]—The question is, whether the plaintiff's quays are rateable under the Belfast Police Acts. There were other questions raised, but it will be sufficient for the court to decide upon that question, and it turns upon the construction of two acts of parliament. The mode of assessment, under the first act, was by a rate imposed upon all persons, not according to the property which such person had in the town, but according to the general substance and ability of such person; and in that act the word "wharf" is mentioned in the enumeration of the different kinds of property, by the possession of which persons became liable to the rate. The first amendment made by the second act was to substitute a new mode of rating, whereby the rate was imposed, not according to the substance of the individual, but according to the property in the town of the rate-payers coming within the particular words in the act; and the question is, whether a quay comes within these words? The 6th section contains the words, "several messuages, houses, buildings, and hereditaments;" and several subsequent sections describe the property, but in none of them do we find the word quay. There are certain general words which would, in law, include a quay; but, on examination, we find that the general words relied on are made to follow other words, and that, according to the well-known rule, *noscitur a sociis*, they are restrained by these words. Upon the whole, we find, first, that the word quay is not to be found in any enumeration of the several kinds of property described in the act. Secondly, that an analogous word occurs in one enumeration in the earlier statute, while that word is omitted in the latter act. Thirdly, that although general words are used in the enumeration of the several species of property to be rated, still they follow other words which limit their generality. Fourthly, that persons rated necessarily occupied; and it is extremely difficult to say that the quay is occupied by the plaintiff in the manner contemplated by this act. He only receives quaysage, and tenants reside along it. His Lordship, after referring to some of the cases cited in the argument, said, if this rate is imposed upon the quaysage which the plaintiff derives from his quay, the answer is, that it is an incorporeal hereditament, and therefore not rateable. If upon the body of the quay, then, that is not of the species of property which it was intended by the legislature to make subject to the rate.

Exceptions overruled.

## QUEEN'S BENCH.

*Saturday the 17th, and Friday the 23d November.*

## EVIDENCE—SET-OFF—PROMISSORY NOTE.

HAMILTON v. GOOLD.\*

**ASSUMPSIT.**—This was an action of assumpsit, tried before BUSHE C.J., at the sittings after last Trinity Term. The declaration contained a special count in the usual form, by the plaintiff, as accommodation acceptor of a bill drawn by the defendant on him for £50, against the defendant, for not indemnifying him from any loss or damage by reason of such acceptance, and averred, that in consequence of the neglect of the defendant to pay such bill at maturity, the plaintiff was forced and obliged to pay the holder of it the sum of £50, whereby the plaintiff was damnified to the amount thereof, together with interest from that time to the present. It contained also the usual money counts, and there was a bill of particulars furnished, claiming only the amount of the bill and interest. The defendant pleaded the general issue and gave notice of set-off. At the trial, the defendant's counsel admitted the plaintiff's claim as set forth in the special count, (the money counts not having been relied on) and offered to give evidence of a set-off, which was objected to by the plaintiff's counsel, but the learned judge allowed the evidence to be given and reserved the objection for the consideration of the court. The defendant then produced a memorandum in the words following:—"My dear sir, you have given me this day £280, which I undertake to return to you next week. This money you have given me on behalf of Sir George Goold,

The plaintiff sued as accommodation acceptor of a bill of exchange drawn by the defendant on him for £50 in the usual form, and averred, that he was damnified to the amount thereof, with interest; the declaration contained the usual money counts and the bill of particulars claimed only the amount of the bill and interest. The defendant pleaded the general issue, and gave notice of a set-off. At the trial the defendant's counsel admitted the plaintiff's claim as set forth in the special count, (the money counts not having been relied on) and gave the fol-

\* This case was re-argued in last Hilary Term, by Mr. *Holmes* for the plaintiff, and by Mr. *Keatinge* for the defendant; the *Lord Chief Justice* hav-

ing been prevented from hearing the previous argument by indisposition; any new cases then cited are introduced into this report.

lowing memorandum, stamped with a penalty, and an agreement stamp, in evidence of the set off, "My dear sir, you have given me this day £280, which I undertake to return to you next week. This money you have given me on behalf of Sir G. G., out of the trust money of Miss G., which you hold for her. H. J. H., (plaintiff.) To Sir G. G., (the defendant.)" *Held*—that the defendant's set-off should be allowed, as the plaintiff might have recovered under the money counts, and he cannot deprive the defendant of his set-off by declaring specially. *Held also*—that the above memorandum should not be interpreted as a promissory note, and was therefore admissible in evidence without being stamped as such.

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"out of the trust money of Miss Gillebrand, which you hold for her."

"19th Nov., 1836."

"H. J. HAMILTON, (the plaintiff.)"

"To George Goold, Esq. (the defendant.)"

This document was stamped with the penalty of £10, and an agreement stamp of £1; counsel for the plaintiff objected to its reception, for want of the stamp of a promissory note; but the learned Judge also allowed this evidence to be given, reserving the objection for the consideration of the court; and the jury found a verdict for the defendant, subject to these two objections.

Mr. *H. H. Hamilton*, on a former day, obtained a rule *nisi*, that the verdict for the defendant in this case should be set aside, and a verdict entered for the plaintiff; against which

Mr. *Lentaigne*, with whom was Mr. *Keatinge*, Q.C., now shewed cause.—The case relied on at trial, in support of the plaintiff's objection to the defendant's set-off is *Hardcastle v. Netherwood* (a); that case was decided on demurrer, and is easily distinguishable from the present one. The test of whether a set-off is allowable or not, is, whether the damages are unliquidated. In *Collins v. Wallis* (b), the damages were held to be liquidated, though there the debt arose upon a guarantie. The amount claimed by the plaintiff, both in his declaration and in his bill of particulars, is the amount of the bill and interest thereon. This is as certain and as much liquidated as it could be in an action on the bill. *Hardcastle* and *Netherwood* is a case where the plaintiff was an accommodation acceptor of numerous bills of large amount, and he claimed only £100 for losses in respect of them, for payments not limited to principal and interest, but including charges and expenses which are more indefinite and unascertained. In the report of the judgment the court is made to say, that special damage might be recovered although no special damage was alleged in the declaration, which shews that the report is inaccurate. As to the objection that the letter is a promissory note, and inadmissible, not being stamped as such, it is laid down in *Chitty on Bills*, that certainty is required on the face of a note, as to the maker and payer. This letter is only an indemnity in case Sir George Goold does not pay it; and there is therefore a contingency in it, which prevents it from being a promissory note, *Leeds v. Lancashire* (c). But at the time the case went to the jury the plaintiff was liable to pay it, and it is then a guarantie or collateral security.—[CRAMPTON, J. Suppose the plaintiff had paid Sir G. Goold the £280, would he still be liable to the defendant? ]—[Mr. *Holmes*.—

(a) 5 R. & A. 93.

(l.) 11 Moore 249.

(c) 2 Camp. 205.

That was their case at the trial, and they got a verdict on that allegation.]—Even supposing the letter was not admissible in evidence, there was evidence of money paid or lent to the plaintiff by the defendant, contained in a letter of the plaintiff's, dated the 19th of August, 1837, and a new trial should be granted. The memorandum was drawn up by the plaintiff, who is a professional man, and should be construed most strongly against him.

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Messrs. *Holmes and Robinson*, with whom was Mr. *Hamilton*, *contra*. The sole cause of action in this case is a special action of assumpsit, for unliquidated damages, the plaintiff having relied upon the special count only at the trial. A set-off is not permitted where the damages are unliquidated, and there is no difference between the special count in this case, and the case of *Hardcastle v. Netherwood* (a), except that the words "charges and expenses" are omitted in this declaration. The damages here are unliquidated, and can only be ascertained by the verdict of a jury; the contract stated is one of indemnity, and the damages are to be measured by the loss the plaintiff has sustained by the defendant's non-performance of his agreement. Special damages, and unliquidated damages are quite different, and it is sufficient to prevent a set-off, that the damages are unliquidated, although no special damage is alleged or claimed. An action for covenant is for unliquidated damages, and set-off is not allowed therein.—[CRAMPTON, J. Will not set-off be allowed in covenant?—No; \* *Auber v. Lewis* (b). That was an action of covenant for non-payment of taxes, according to a covenant in a deed; the sum was ascertained, yet, a demurrer to a plea of set-off was allowed; in *Cooper v. Robinson* (c), a demurrer to a similar plea was allowed, and in that case the court said that, if the plaintiff had sued in debt, a set off would be allowable, but that he had a right to choose his form of action. So here, even if the plaintiff could have sued in debt, or relied

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\* That a set-off is not allowed in repairs, was disallowed for covenant, is not laid down by various objections to the plea, and text writers, although the authorities seem strong on the subject. 1 Lawrence, J., remarking on that case in *Hammond v. Toulmin*, 7 Selwyn N. P. 532. In *Gower v. T. R.* 618, says, "the defendant had liquidated the damages by paying a sum of money for repairs, yet, same could not be set-off." However, in Leigh's N. P. 181, the court thought a set-off good in covenant, but the authority of that case is overturned in *Howlett v. Strickland*, Cowper P. 699, it is laid down but no authority is cited for the position, that "In covenant for rent a set-off and a plea of set-off of £30, laid out will be allowed."

(a) 5 B. & A. 93.

(b) Manning's Dig. 2 Ed. 251.

(c) 2 Chy. R. 151.



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on the money counts, he has not done so, and the set-off cannot be allowed against the special count. In *Hutchinson v. Reid* (a), and *Colson v. Walsh* (b), notice of set-off was given, and evidence thereon rejected. Lord Kenyon said, in the latter case, "this action is for damages for breach of an agreement," which is also our case. In *Howlett v. Strickland* (c), it was held that in covenant, damages arising from the breach of other covenants by plaintiff could not be set-off. The statute of set-off is the 25 G. 2, c. 8.; it only authorises mutual debts to be set-off; and neither debt can be for an indemnity. The case of *Morley v. Inglis* (d), is the converse of the cases just cited; a guarantie was given by the plaintiff, which was pleaded as a set-off, and the sum in the plea stated with certainty, yet, the court held it not to be a mutual debt within the statute. The defendant here then is in this dilemma; the set-off here either is a promissory note, or it is not; if it is a promissory note, it wants the proper stamp; if it be a special agreement, it is not the subject matter of set-off, according to this case of *Morley v. Inglis*. The set-off given by the bankruptcy acts extends to mutual credits, or to debts and demands, which goes far beyond the general statute of set-off, and therefore the cases decided upon the set-off given in bankruptcy cases do not apply generally. The distinctions are drawn and commented on by Tyndall, C. J. in *Gibson v. Bell* (e).

As to the second objection, if the document be a promissory note, it cannot be received in evidence without being stamped as such. The first part of this instrument is clearly a note, and what follows cannot alter the nature of the security. The contract is to repay the money within a week, and it has all the essential qualities of a note: the sum is certain, and the time, and the persons who are to pay and receive it, are all certain. The subsequent part introduces no qualification or uncertainty into the terms of the note; it is merely a statement of facts, not varying the contract. It is not necessary that the instrument should be negotiable. In *Chadwick v. Allen* (f), much extraneous matter was introduced into the document, yet it was held to be a promissory note within the statute. So also in *Green v. Davis* (g), the court held a document to be a promissory note, although no payee was expressly named in it. The case of *Butts v. Swan* (h) was one in which a series of letters was relied on; but the court held, that the one which contained the promise to pay ought to have been stamped with a note stamp, as being within the stamp act, though subject to a contingency. It is observable, that the documents in the two last-mentioned cases had a penalty and an agreement stamp

(a) 3 Camp. 329.

(b) 1 Esp. N. P. C. 378.

(c) Cowp. 56.

(d) 5 Scott. 314.

(e) 1 Hodges 138. S. C. 1 Bing. N. S. 743. &amp; 1 Scott. 712.

(f) 2 Str. 706.

(g) 6 D. &amp; R. 306; S. C. 4 B. &amp; C. 235, and 1 C. &amp; P. 451.

(h) 4 Moore, 184.

affixed on them, as in the present case. In *Wise v. Charlton* (a), there was, in the latter part of the document an equitable mortgage, and yet, it was held to be a promissory note. In *Morris v. Lee* (b), "I promise to account with T. S., or order, for £50, value received by me," was held to be a promissory note. No precise form of words is necessary.\* The construction now contended for by the defendant is contrary to that relied on at the trial, when he insisted, that although the plaintiff had credited Sir G. Goold with the money, he was bound to repay it to the defendant, having given an absolute undertaking to return it to him.

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Mr. Keatinge, Q. C., replied. The defendant admitted, at the trial, that plaintiff's claim was well founded, but insisted on his right to set off a debt of a larger amount; the justice of the case is therefore with the defendant. The bill was due before the 19th of November, 1836, the time when the claim of set-off arose; it was paid without costs, charges, or expenses of any kind; and therefore the plaintiff's claim was limited to £50 and interest, which is the amount of damnification stated by him. This is all claimed either by the declaration or by his bill of particulars. The principal he might have recovered on the money counts, and also the interest; and, under the bill of particulars, nothing more could be recovered. The jury might give him less, but more he could not recover. In *Hardcastle v. Netherwood*, there were "charges and expenses," and the reasons given in the judgment shew that a set-off might lie to the money part of the demand. The court said, defendant might perhaps have pleaded a set-off to the money part of the demand. In the present case, the defendant is not embarrassed by having pleaded, as it arises upon a notice of set-off.—[BUSHE, C. J. Might not the plaintiff have been entitled to damages for the injury done to his credit, or by having been obliged to raise money to take up the bill at exorbitant interest?—The declaration has tied up his claim for damages to the amount of £50, and interest, and this is the whole which the bill of particulars claims.—[CRAMPTON, J. The plaintiff founds his complaint on having been obliged to pay £50. BUSHE, C. J. The concluding part of the declaration claims £100 damages.]—It follows the money counts. The true principle is laid down by *Tyndall, C. J.*, in *Morley v. Inglis* (c). "The rule by which a question of set-off is to be decided, is, whether the claim can be ascertained with distinctness." Can it be seriously argued, that a jury is required to compute interest?—[CRAMPTON, J. Per-

(a) 6 Nev. & M. 364.

(b) 2 Raym. 1396. S. C. 8 Mod. 362;

(c) 4 Bing. N. S. 71.

\* In addition to the cases cited, see also, on this subject, *Wheatley v. Williams*, 1 M. & W. 533;

*Brooks v. Elkins*, 2 M. & W. 74; and *Jones v. Ryder*, 4 M. & W. 32.

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haps they might not give it.]—We concede that ; but, on bills of exchange, interest is also in the discretion of a jury, and the same objection would hold to an action on a bill of exchange claiming interest. In the above case, Tyndall, C. J. says, "Wherever the demand is capable of being liquidated, a set-off may be pleaded." The evidence given by the plaintiff in this case would have supported the count for money paid to the use of the defendant ; and as a set-off would be admissible to any money count, the plaintiff cannot be allowed to oust that defence, by saying that he relies solely on his special count, especially as there was only a notice of set-off. In *Birch v. Depeyster (a)*, the declaration contained a special count, and the money counts. The defendant pleaded to the latter a set-off, and *Gibbs*, C. J. refused to permit the plaintiff to deprive the defendant of his set-off by declaring specially, when he might recover on the money counts. The defendant may treat this as a special agreement ; and although it might be treated as a promissory note, still, in the mercantile world, it could not be used as such. The language is not in the usual terms of a note, and it goes on to specify the fund out of which it was given, and the purpose for which it was to be used. It was intended to make this a separate and distinct transaction between the parties.—[CRAMPTON, J. The question is not as to the intention of the parties, but as to the legal effect of the document. *Ellis v. Ellis (b)*.] In a case of ambiguity, the instrument must be construed most strongly against the maker, and the holder may elect to treat it in the way most advantageous to him. In the present case, the document in question was prepared by the plaintiff, a professional gentleman. *Edis v. Bury (c)*, *Leeds v. Lancashire (d)*. In *Ellis v. Ellis*, a similar instrument was held to be an agreement ; and in *Tomkins v. Ashby (e)*, a memorandum in these words, "Mr. T. has left money in my hands," was admitted without a stamp. In a case where the stamp duty has been fully paid, the court will be liberal in the construction of documents. *Horne v. Redfeam (f)*. The stamp act, 56 G. 3, c. 56, provides for instruments which are special agreements, and not promissory notes, though such in form.

Wednesday, January 30th, 1839.

BUSHE, C. J., in delivering the judgment of the court, after stating the pleading and evidence, and reading the document of the 19th of December, 1836, in this case, said—The plaintiff's counsel made three objections:—first, that the credit was given to the plaintiff by the de-

(a) 4 Camp. 385. S. C. 1 Star. 20.

(c) 6 B. & C. 433.


(e) 6 B. & C. 541.

(b) Bailey on Bills, 6.

(d) 2 Camp. 205.

(f) 4 Bing N. S. 433.

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fendant and Sir G. Goold jointly. I directed the jury, if they considered that the credit was so given, to find for the plaintiff: but if they thought that the credit was given by the defendant alone, to find for the defendant. The jury found for the defendant. No objection has been made to my charge on this point, nor to the finding of the jury. I reserved the two remaining points, with liberty for the plaintiff to apply to change the verdict for the defendant into a verdict for the plaintiff, in case the court should decide in favor of either of the objections. The first point reserved is, that this is not a case of mutual debts between the parties, the plaintiff's demand being for unliquidated damages. The question is, whether the plaintiff's claim be of such a nature; for, if so, the set-off cannot be sustained. The plaintiff, by his declaration, and also by his bill of particulars, only seeks to recover the amount of the bill of exchange and interest. This he might have recovered under the count for money paid for the defendant. *Seaver v. Seaver (a)*. The plaintiff cannot be permitted, by introducing a special count, to defeat the defendant's right to set off, *Birch v. Depeyster*; and here, the defendant's notice of set-off is to the whole declaration. The case of *Hardcastle v. Netherwood* was relied upon by the plaintiff; but in that case, there was only a special count, and the plaintiff claimed charges and costs, which were unliquidated damages, and not a debt; and the court intimated an opinion, that the defendant might have pleaded a set-off to so much of the count as charged him with the amount of the bill of exchange paid by the plaintiff. The case of *Hutchinson v. Reid* is an authority that the defendant might have pleaded a set-off, if the action had not been brought before the two months expired for which the bill, on which he relied as a set-off was drawn. We are of opinion that the set off in this case must be allowed, because the plaintiff might have recovered under the money counts, and he cannot deprive the defendant of his set-off by pleading specially.

The remaining objection is, that the instrument relied upon by the defendant was not admissible in evidence, for want of a promissory note stamp. It certainly is not like an ordinary promissory note, nor could it be supposed that the parties intended it to be treated as a promissory note. However, if the legal interpretation of it is, that it is a promissory note, the plaintiff must recover, as the only stamp affixed to it is an agreement stamp. But if it be an acknowledgment or an agreement, the case is otherwise. The first part of it bears a resemblance to a promissory note, but this cannot be looked upon by itself; the remainder cannot be rejected as surplusage; it has no reference to a promise—the names of other parties are introduced. It appeared, upon the trial, that plaintiff was requested by Sir G. Goold to take up

(a) 6 C. & P. 673.

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certain bills then due in Dublin, and defendant lent the money for that purpose, and took this instrument as a security. It appeared, also, that the money was applied to Sir G. Goold's purposes; that agency accounts were for many years unsettled between the plaintiff and Sir G. Goold, and that the accounts were litigated in Equity, and remained unadjusted at the time of the trial. The plaintiff's defence to defendant's cross-demand was, that the cash was advanced by defendant and Sir G. Goold jointly. This led to much investigation at the trial. Sir George Goold was examined as a witness. This part of the case I left to the jury, who found for the defendant. It is clear, from these facts, and the relation of the parties, that both parties considered this document in the concluding part as qualifying the dealings between them, and referring to more than a mere loan and promise to repay. What is the meaning of the words at the foot of the instrument? They are not easily explained. It is enough to say, that the parties had some meaning in attaching the concluding part to it; and there is no meaning which does not carry it beyond a promissory note. Perhaps it means that Sir G. Goold should be liable in the first instance, and, therefore, it could not have been declared upon as a promissory note. *Edis v. Bury*. The instrument must be interpreted for the purposes for which it was made; and it would be unreasonable that such an instrument, drawn up by the plaintiff himself, a professional man, should be treated as a promissory note.

Judgment for the defendant.

Saturday, January 12th.

## PRACTICE—MARKING JUDGMENTS—DILATORY PLEA.

JOHN HOGG v. EDWARD ARMSTRONG.

A rule *nisi* will be granted to mark judgment against the terretenants notwithstanding the plea that "A. is heir and that no writ issued to summon him" if it be not verified by affidavit.

Mr. PEEBLES moved for a rule *nisi* to mark judgment against the several terretenants, notwithstanding the plea, "that one G. Armstrong is the heir of the deceased cognuzor, and no writ has issued to summon him," said plea not being verified by affidavit, pursuant to the statute 6 Anne, c. 10, s. 11. This is a dilatory plea, and evidently pleaded for delay; it does not aver, that said G. Armstrong has any lands by descent, and it concludes by praying, if they ought to answer the writ until, &c. In *Phelps v. Lewis* (a), on a similar plea, judgment was marked in the office in England, for want of an affidavit to verify it, and the court refused to set aside the judgment or to allow the affidavit to be filed *nunc pro tunc*. In *O'Dell v. Raymond* (b), a rule *nisi* was obtained to set aside a similar plea, though verified in part, and the rule

(a) Forrest 144.

(b) Fox & S. 214.

was made absolute on argument. *E. Armstrong* has been returned as heir, but has pleaded "that he is not heir;" to this plea the plaintiff must demur, *Carroll v. Cooke (a)*.—[CRAMPTON, J.—Have you served notice?—No; I seek only a conditional order, and it would be done in England without notice in the office.

A rule *nisi* was granted and afterwards made absolute on a certificate of no cause.

(a) 1 Jebb. & S. 33.

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November 6th and 9th, 1838, and January 25th and 30th, 1839.

### EJECTMENT FOR NON-PAYMENT OF RENT—RIGHT OF RE-ENTRY—SURRENDER OF PART OF THE PREMISES.

Lessee of *THOMPSON v. HOME*.

**EJECTMENT** for non-payment of rent. At the trial at the Sittings after last Trinity Term, before CRAMPTON, J., there was produced in evidence, on behalf of the plaintiff, a certain indenture of demise, made and executed by and between George Thompson, the lessor of the plaintiff, of the one part, and George Home, the defendant, of the other, whereby the said G. Thompson, in consideration of £1200, and the yearly rent and covenants therein set forth, demised to the said G. Home the house No. 34, College-green, and premises, as described in the declaration, from the 1st of June, 1827, for 30 years, at the yearly rent of £500, to be paid and payable by fifty-two weekly payments of £9. 12s. 4d., the first weekly payment to begin and to be made on the first Friday in June, 1828, and if at any time unpaid for three days, it should be lawful for the said G. Thompson, his executors, &c., to distrain; and if no sufficient distress, then, that it should be lawful for the said G. Thompson, his executors, &c., into said demised premises,

Where G. T. having demised a house and premises from June, 1827, for 30 years, to G. H., in consideration of £1200 and £50 a year, brought an ejectment for non-payment of rent in 1833, and gave this case in evidence; and the defendant gave in evidence a deed which was produced by the attorney of the lessor of the

plaintiff, pursuant to notice, and which expressed to be by and between G. H. of the one part, and G. T. of the other. It was dated the 27th July, 1829, and two drawing-rooms, part of the demised premises, were thereby surrendered to G. T. It was executed by G. H. alone, and contained the following proviso—"Provided always, nevertheless, and it is hereby declared and agreed by and between the said parties to these presents, to be the true intent and meaning thereof, and the same are upon this express condition, that nothing herein contained shall in any manner prejudice or affect the covenant for payment of the said yearly rent of £500, or any other covenant in said lease contained, on the part of the tenant, his executors &c., to be done, &c., or any of the clauses, conditions or agreements therein contained, or any of the remedies for the recovery of the said, or the enforcing of the said covenants, conditions, &c. on the part of the said G. T., but that the entire of the said yearly rent shall still be and continue payable out of same; and the said covenants &c shall be and continue in full force, &c. as to all the residue of said demised premises, and not hereby surrendered; and that said G. T. shall have all the like remedies for the recovery of said rent, and enforcing said covenants, &c. as if these presents had not been made, anything, &c." Signed G. H. : *Held*—that this deed of surrender did not operate to destroy the right of re-entry, but that it alone, or taken in connexion with the original lease, constituted an article, minute or contract within the 25 Geo. 2, c. 13.

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or any part thereof, to re-enter, and the same to re-possess and enjoy, as of his or their former estate. The other usual evidence having been then given on the part of the plaintiff, the defendant's counsel proved payment of rent by the defendant up to March, 1837, and then called upon the attorney of said G. Thompson, pursuant to notice, to produce a certain deed which they then gave in evidence, and which was dated the 27th of July, 1829, and expressed to be between G. Home of the one part, and G. Thompson of the other part, but was executed by G. Home alone. This deed, after reciting the deed of the 30th of June, 1837, recited an agreement between said parties, that said G. Home should surrender the two drawing-rooms, &c., part of said premises so demised as aforesaid, by said deed of the 30th of June, 1827, in consideration of £525, to be paid in hand; and then stated, that in consideration of said sum, said G. Home did surrender said part of said premises to said G. Thompson. There was then a covenant, on the part of G. Home, that he had full power to make this surrender; and then came the following proviso:—"Provided always, nevertheless, and it is hereby declared and agreed, by and between the parties to these presents, to be the true intent and meaning thereof, and the same are upon this express condition, that nothing herein contained shall in any manner prejudice or affect the covenant for payment of the said yearly rent of £500, or any other covenant or covenants in said recited indenture of lease contained, on the part of the tenant or lessee, his executors, &c., to be done, performed, or fulfilled, or any of the clauses, conditions, or agreements therein contained, or any of the remedies for the recovery of the said rent, or the enforcing of the said covenants, clauses, conditions, and agreements, or any of them, on the part of the said G. Thompson, his heirs, &c., but that the entire of the said yearly rent shall still be, remain, and continue payable and issuing out of same; and the said covenants, clauses, conditions, and agreements, and every of them, shall be, remain and continue in full force and effect, with respect to all the rest and residue of said premises, by the said indenture demised to the said G. Home, and not hereby assigned or surrendered; and that the said G. Thompson, his heirs, &c., shall have all and every the like remedies for the recovery of the said rent, and enforcing the said covenants, conditions, clauses and agreements, and each and every of them, as if these presents had not been made, any thing herein contained to the contrary notwithstanding. In witness whereof, the parties aforesaid," &c. This deed was signed "George Home," and attested by two witnesses. The defendant's counsel having read this deed, closed their case, and called upon the learned Judge to direct the Jury, if they believed the evidence, to find a verdict for the defendant; but the learned Judge, on the contrary, directed the jury, if they believed the evidence, to find for the plaintiff, which they accordingly did. The defendant's counsel took an exception to the charge of the learned Judge,

and the point of the exception was, that by the operation of the deed of surrender of part of the demised premises, the condition of re-entry in the original lease was gone, and that the jury should find for the defendant.\*

Mr. *Napier*, with whom was Mr. *Smith*, Q. C., and Mr. *Fitzgibbon*, in support of the exception.—There are two propositions which the defendant must establish; first, that the lessor had no right to re-enter at common law, and secondly, that when the right of re-entry at common law is nullified, ejectment under the statutes is not maintainable; as the statutes only facilitate the mode of recovering in ejectment, but do not extend to any new case not within the common law. There was no right of re-entry at common law when the ejectment was brought; that right always depended upon the contract of the parties; upon con-

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\* The following clauses in the ejectment statutes were referred to in the argument:—

The 11 *Ann*, c. 2, s. 2, which enacted, that when more than one half-year's rent is due, and no sufficient distress on the premises, a summons in ejectment shall stand instead of re-entry, in all cases between landlord and tenant, where the landlord or lessor to whom same was due, hath right, by law, to re-enter for the non-payment thereof. The 4 *G.* 1, c. 5, s. 3, which merely extends the remedy to cases in which more than one year's rent is due, although there be a sufficient distress on the premises.

The 8 *G.* 1, c. 2, s. 1, which recites that the remedy was evaded by taking defence in the name of a stranger, and enacts, that where one year's rent is due, landlord may bring ejectment on service of summons, and notice in writing given, that it is for non-payment of rent.

The 5 *G.* 2, c. 4, s. 1, after reciting that several lands, &c. have been demised for terms of lives, or years determinable upon lives, and that a doubt existed whether lessor, where there is no clause of re-entry, can bring ejectment, although above a year's rent is due, enacts, that where a year's rent is due, such lessor may bring ejectment, as if there was a clause of

re-entry and not otherwise; and by s. 2, every lessor or lessors having judgment and execution on ejectment for non-payment of rent, shall have like remedy for arrears, as if no such ejectment had been brought.

The 25 *G.* 2, c. 13, s. 2, enacts that where the rent is ascertained by an article, minute or contract, and the land is enjoyed under it, and one year's rent is in arrear, the landlord may bring his ejectment as if such article, &c., contained an actual demise and a clause of re-entry; and, by the 3d section, on ejectment in pursuance hereof, if no counterpart was perfected, or if lost or mislaid, and lessor gives in evidence the original, or a copy of it, or of such counterpart, and enjoyment of the lands, it shall be of same force as if the counterpart was produced and proved.

The 15 and 16 *G.* 3, c. 27, s. 3, after reciting the doubt which existed as to whether an ejectment for non-payment of rent reserved upon leases for tithes could be maintained, enacts, that where one year's rent shall be due for same, and the lessor hath right by law to re-enter for non-payment thereof, such lessor may bring ejectment, in same manner, &c., as in case of ejectment for non-payment of rent reserved upon a lease of lands or other premises.



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dition broken. If the question was upon the lease, there would be no doubt about the right to re-enter; but the deed of surrender, by dispensing with the condition in part, operated to suspend it altogether. A condition cannot be thus apportioned or divided, *Winter's case* (a). A condition annexed to land cannot be apportioned by any of the parties themselves, so as to become void as to one part of the land, and to remain good as to the other, because its essence is indivisibility. *Co. Litt.* 202<sup>b</sup> Note 2. The same position is established in *Twynani v. Pickard* (b), where Holroyd, J. says, "the severance of any fact of the reversion destroyed the whole condition, which was entire, and the breach of which gave one entire right of entry into the whole premises on non-payment of rent." The same doctrine is laid down in 4 *Bythewood's Comy.* by Jarman 367, as a doctrine disapproved of, but too well established now to be shaken; and by Gibbs, C. J. in *Mason v. Curder* (c). The proviso therefore in this deed, so far as it relates to conditions, is inoperative; and if operative, the lessor could not avail himself of it, not having executed the deed, *Anonymous* (d).

The same law is laid down in *Browning v. Beston* (e), and 7 *Vin. Ab.* 491. This is not a revival of the condition; there is no re-demise; it is in terms an attempt to *continue* the conditions as to the part not surrendered. It must be contended that the condition has been released as to part, and continued as to the residue; for if gone as to the whole how could it remain as to a part? and here the entire demise is sought to be evicted: and by the surrender of part, the land only is severed, but not the original contract of demise, *Bac. Ab. Leases*, S. 3, *ad fin.* In the cases of revival it affects the whole lands; here the ejectment, founded on a subsisting lease of the whole, could only partially evict, and it is a principle that the lease cannot be partially evicted; the true reason of which is, because the basis of the ejectment is an indivisible condition of re-entry. The second proposition depends upon the true construction of the ejectment statutes. There are six statutes to be considered, and these must be all taken together and construed as one act; by *Pennefather, B.* in *Russell v. Thynne* (f), and this is also very pointedly stated by *Bushe, C. J.* in *Lessee of Black v. Davis* (g). The first act is the 11 *Anne*, c. 2; and the object of this act is to facilitate the mode of proceeding by ejectment, in cases of re-entry for non-payment of rent, and it is *expressly* confined to cases where the lessor hath *right by law* to re-enter. It substitutes the service of a summons for a demand and re-entry; and authorises judgment for the plaintiff where, 1st the summons is served; 2dly, there is more than half a year's rent in arrear; 3dly, no sufficient distress; and 4thly, *power* to re-enter in the lessor. Nothing can be plainer, than that

(a) 3 Dyer 309 a.

(b) 2 B. &amp; A. 112.

(c) 1 Taun. 9.

(d) 1 Dyer 6 b.

(e) 1 Plow, 133, 131.

(f) 6 Law Rec. N. S. 275

(g) Batty 99.

this statute merely modifies and improves the common law proceeding ; and the qualification contained in this act must be considered as perpetuated in the subsequent acts ; it was so held in *Bayly v. Murin* (a), in the second resolution concerning leases of Ecclesiastical persons ; and also that such course is usual in the construction of statutes made *in pari materia*. The second statute is the 4 G. 1, c. 2 ; and instead of requiring proof of second and third requisites under the former act, it substituted proof of more than a year's rent in arrear, without reference to sufficiency of distress. It merely renders the proceeding more available, but does not extend to any new class of ejectments. The third statute is the 8 G. 1, c. 2, s. 1, and gives the power of ejecting where there is a year's rent in arrear ; and also gives additional facilities to plaintiff to have judgment in such manner, and under such provisoes as in former acts. So far, the remedy is only made more easy and effectual, in such cases as admitted of the common law remedy ; the purpose and effect of the statutes being to simplify, but not to extend the remedy by ejectment. The fourth statute is the 5 G. 2, c. 4, and is a material act to consider ; it provides for leases *for lives*, and for years determinable *on lives* ; and it recites that doubts were entertained, whether under the statutes, ejectment could be maintained on such leases where *no clause of re-entry* was inserted ; and it provides that ejectments may be maintained, as if a clause of re-entry had been specified therein ; *but not otherwise*. That merely supplies the omission of a clause of re-entry in the instrument of demise in two classes of leases, and does not apply to the present case ; 1st, because it is a lease for 30 years *absolute* ; 2dly, because there is an express clause of re-entry in the lease. But whether the clause of re-entry be expressly or virtually inserted in the lease, the effect of the surrender upon the right of re-entry is the same ; that is, the objection to the ejectment is wholly independent of any question upon this statute. It also shews what the law was before this act ; that a right of re-entry was essential to the maintenance of an ejectment under the previous acts. There was a distinction between a chattel and a freehold lease ; for the former, a clause of avoidance was sufficient to create a forfeiture or breach of the condition and to give a right of re-entry ; but the latter was only voidable on breach of the condition, and an actual entry was requisite to affirm the forfeiture, *Co.Lit.* 214<sup>b</sup>. *Goodale v. Wyatt* (b). So also in *Hayward v. Fulcher* (c), in a case put in *Doct. and Stud.*, 2 Dial. Ch. 34 ; and in *Taylor v. Horde* (d), where Lord Mansfield says, " though the intent be not fulfilled the feif-  
" for or his heirs may not re-enter, for he reserved no entry by express  
" words." Thus in a demise for lives, the clause of re-entry should be

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(a) 1 Vent. 247.

(c) Palm. 503.

(b) Goulsh. 178.

(d) 1 Bur. 125.

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annexed to the condition of avoidance, to give a right of re-entry ; and the statute supplies the former omission, where this clause was not originally inserted, thus remedying a technical defect ; and this explains why this statute is limited to the demises for lives and for years determinable on lives : and thus there is in this statute an implied legislative declaration, that at common law, a right of re-entry was essential to maintain an ejectment ; and this construction of this act makes all clear and consistent, and materially confirms the defendant's case. The 5th act is the 25 G. 2, c. 13, and it extends the remedy to holdings under equitable articles, that is potential demises, which a Court of Equity would convert into formal leases, with all the usual clauses, covenants, and conditions. There is no express clause of re-entry required in such cases, but this applies only to instruments in their inception imperfect. The utmost this statute could do in the present case, is to incorporate virtually what is actually specified in the lease. The last act is the 15 and 16 G. 3, c. 27, and it removes a doubt as to whether ejectment for non-payment of rent could be maintained on a lease of tithes ; and it puts tithe upon the same footing as rent. It is an explanatory act, and yet particularly repeats as to the *right by law to re-entry*. The 5 G. 2, could not apply to any case of tithes, as entry was not practicable, and thus, all are made consistent. If the common law right of re-entry can be dispensed with, ejectment for non-payment of rent might be maintained on a parol demise. The words which exclude it are those, as to the right to re-enter. All landlords could distrain but not re-enter, *Blennerhassett v. Day* (a) ; where the Lord Chancellor says, that as the defendant had no right to re-enter, he could not maintain ejectment for non-payment of rent. The 1 and 2 W. 4, c. 31, s. 12, uses the words, " when right of re-entry shall accrue, &c." There can be no equitable construction of these acts, they are remedial as to the mode of bringing the ejectment, but they should not be extended, being also penal, *Ellison v. Murphy* (b). There is one authority against the defendant. It is the case of *Keilly v. Ahearne* (c), and in that case two points were ruled, upon the principal that the remedy under the ejectment statutes was not analagous or founded on the right of entry at common law. 1st, that although the right of entry was extinguished the ejectment was maintainable ; 2dly, that, although by the lease the right of entry was given after twenty-one days, on non-payment of rent, the demise was properly laid on the day after the gale day. Directly the reverse is laid down as to the time of laying the demise when there are days of grace, in 2 *Howard's Exch.* 65. But a still more important authority is to be found in *Doe d. Lawrence v. Shawcross* (d), on the

(a) 2 Ball. & B. 104.

(c) Batby 18, *noti.*

(b) 4 L. R. 161.

(d) 3 B. & C. 752.

analogous English statute, ruling that the title of the lessor is regulated by the common law proceeding. This case confirms the law as in *Howard*, and places it on the principle of the statutable remedy being merely a modification of the common law ejectments. Thus, it prostrates one part of the decision in *Keilly v. Ahearne*, and disturbs the common foundation of both parts. The common law analogy is also followed by the *Exchequer* in *Lessee of Allen v. Smith* (a). In *Lessee of Purcell v. Kirby* (b), in this court, *Crampton, J.* in delivering the judgment of the court, intimated his dissatisfaction with the note in *Batty*. He said it was a short loose note without dates or particulars, and remarked that the parol sub-demise could not affect the legal instrument. The *Exchequer* decisions on the ejectment acts are loose and apocryphal and founded on a capricious equity; and it differs from this court on all the leading questions on the ejectment statutes.

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Messrs. *Holmes* and *Whiteside*, *contra*.—The question depends upon the effect the court will give to this deed under the ejectment statutes. The doctrine of the indivisibility of conditions does not apply; and being a subtle doctrine established in subtle times, and not well founded; if the court can by astuteness get rid of the objection, it is bound to do so; and it will submit to any rigid rule with the greatest reluctance in favor of the defendant. The deed in this case is on the face of it *inter partes*, and not a deed poll. The passage from *Winter's case* (c), only decides this, that where the lessor entered into a part of the land demised, that then the right of re-entry is gone; but to apply that to the present case, the defendant was bound to shew that lessor did enter into possession of the drawing-room, &c., which does not at all appear from the bill of exceptions. This is the case of a surrender executed by the surrenderer alone, and nothing to shew the surrenderee ever accepted of it, without which, the entire argument falls to the ground. It is impossible for a tenant thus to get rid of his estate and to constitute a valid surrender; it must clearly appear that the surrenderee accepted of it, *Chambers' Landlord and Tenant* 822. If the surrenderee did accept of it, it must be taken that he accepted of it, upon the terms, that it was to be for his benefit, as well as for the benefit of the tenant; *Thompson v. Leach* (d), the leading case on the effect of surrender.—[BURTON, J. It must appear that the surrenderee accepted of the surrender.]—And here the defendant continues to pay the same rent as in the original lease, which is a presumption against such acceptance. In order to effectuate a surrender, an acceptance was held to be necessary by *Ventris*; the other three Judges held that notice of the surrender and an

(a) 1 Jones 279.

(b) Not reported; decided in M. T. 1825.

(c) 3 Dyer 309 a.

(d) 2 Vent. 198.

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agreement to accept it was necessary ; the decision of the three Judges was confirmed in the King's Bench, *Thompson v. Leach* (a) ; the case then went to the House of Lords, where it was reversed ; and they held that acceptance should be presumed until the contrary was shewn. But that applies only to freeholds ; and it is assumed in that case, that the surrender is for the benefit of the surrenderee. In the present case, at most, there is nothing but a presumption of law, that the lessor ever accepted of the surrender ; and if the deed is to be construed in the way contended for, it would be a monstrous presumption to say he accepted of this surrender upon the terms of losing the conditions of the original lease, and thus working the greatest possible injury to himself ; and therefore, the case in *Ventris* cannot govern the present ; because here the lessor has every disadvantage. The court is called upon to force an estate upon a grantee, not upon the grantor's terms, but upon terms which destroy all the grantor proposed to give. Even if he executed this deed on the express stipulation, that it should have a certain effect, which it turns out it has not, still he would have a right to disclaim it. The deed must be taken entirely, and no jury would say that the lessor took the surrender on the terms they say the deed implies, but only upon the terms expressed in the deed ; and therefore if the deed is to be so construed, there was no acceptance.—[PERRIN, J. Should you not have had that left to the jury ? the case in *Ventris* states the finding of the jury in this particular.]—There is no case where the grantee was presumed to have accepted on terms different from those which the deed contains. It has been held in *Common Pleas* in this very case, that where the surrender is not absolute but conditional, it does not destroy the condition. In this case it is conditional ; and that it may be so is plain, from *Perkin's Conveyancing* 624, where he says, "it is to be known that the surrender of a freehold, made by deed indented upon condition, is good ; and if the surrender be of an estate for years in land, then the surrender may be made upon condition without a deed." [CRAMPTON, J. What is the condition in this ?]—The condition is, that the surrenderer will abide by the clauses, &c., in another deed, and if he does not, the deed must fail.—[CRAMPTON, J. That is a condition annexed by the defendant.]—A conditional release is quite inoperative, if the condition is not fulfilled, *Kesterton v. Sabery* (b). It has been said, that although a party does not execute a deed he may be bound by it. If a party be named in a deed, he may be bound if he agree to it, but the argument was, that we were bound by it, *Co. Lit. B's. ed.* 231 a. *Rawlyn's case* (c) is against the plaintiff, but see by the second resolution in that case the necessity of entry or acceptance of the surrender ; and it is laid down in this case, that the

(a) 3 Mod. 296.

(b) 2 Chy. R. 511.

(d) 4 Rep. 52 a. &amp; b.

rent was suspended, and an entry by the surrenderee. In the present case the rent was not suspended, and the third resolution in that case is not law upon the authority of *Hodgson v. Thornborough* (a). The rent in this case is not suspended, and the object of the ejectment statutes is to recover rent and evict. Why should not parties revive or continue the covenants in a former deed, if they agree and consent to do so? *Dormer's case* (b), shews what parties may do by consent. This is not a freehold, and with respect to chattels, a condition may be attached to them after interest created; and the words of the condition may move from the lessee, *Hudson's Landlord and Tenant*, 321. As to the second proposition, if sustained, the case of *Kielly v. Ahearne* (c) must be overruled. The argument is, that if the landlord accept the smallest portion of the demised premises from the lessee, his remedy at common law is gone, and also his remedy under the ejectment statutes. Is there any thing in the law to prevent a man giving up part of the premises to the lessor, and saying, that for the residue he will be bound by the covenants, &c., in the original lease? A passage from *Howard's Exchequer* has been cited against the court itself, where it made a decision upon solemn argument. As to the case of *Doe d. Lawrence v. Shawcross* (d). Bayley, J. had only the English act before him, which preserves all the rights of a party at common law; whereas in the case of *Keilly v. Ahearne*, the attention of the Court of *Exchequer* was called to the whole body of the ejectment statutes. The point in *Pluck v. Diggs* (e) does not come in here, and although the Court of *Exchequer* differed from this court upon that question, that is no reason why this court should differ from it upon this question, but every point ought to be strained to secure uniformity of decision; as is said by *Joy, C. B.* in *Lessee of Walsh v. Feely* (f). It has been said, that the proceeding under 11 *Anne*, c. 2 is a substitution for the common law proceeding; but *Batty* (g) denies that the summons under it is a substitution for the right of entry at common law. The 4 *G.* 1 gives the remedy, and omits the words "having right by law to re-enter." The 5 *G.* 2 is the act upon which the defendant relies; the argument is, that this lease, being a lease for years, did not come within the act. The preamble cannot limit the enacting part, *Dwarris on Statutes*, 657. The enacting words, if they take in the mischief shall be extended for that purpose, though the preamble to the statute does not warrant it, *Basset v. Basset* (h); *Doe d. Bywater v. Brandling* (i); and the title of a statute is no part of the statute, *Mills v. Wilkins* (j). The preamble of this act alone excludes terms of years; they are clearly included in the words of the second section, which are, where

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(a) 2 Lev. 143.

(c) Batty 40 *note*.

(e) 2 H. &amp; B. 1.

(g) Batty R. *ap*.

(i) 7 B. &amp; C. 643.

(b) 5 Rep. 47 *a*.

(d) 3 B. &amp; C. 752.

(f) 1 Jones 416.

(h) 3 Atk. 204.

(j) 6 Mod. 62.

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so much rent is due "to any landlord," and "every lessor or lessors" shall have same remedy; where the mischief exists, the court should construe that the legislature intended to give the remedy. The deed in this case is within the 25 G. 2; *Home* gives up a part of the premises and says, that for the residue he will be bound by the covenants in the original lease; is not this a new contract with that condition annexed to it? The condition is not divided, but expressly fixed to the residue of the premises, and this act gives a remedy where there is no demise and no clause of re-entry. The deed in this case contains no demise; it states the rent, it describes the premises; there has been possession under it, and payment of rent for nine years; every thing to constitute such a minute or contract as is contemplated by this act, and therefore, upon it we should recover. *Sugden on Venders and Purchasers*, 70.—[BURTON, J. Must not the minute in writing be signed by the lessor?—We say not. If the deed contained an actual demise, the lessor could recover under the previous ejectment statutes; if it does not he is entitled to recover under this act. Whether the lessor executed it or not it is within the act, because a mere proposal would be binding although not signed, and although it should be *inter partes*, *Tempest v. Rawling* (a). Either the lessor is bound by the deed, or he is not; if he is bound by it, he has a clear right to bring his ejectment. The 25 G. 2 desires the court to consider such an instrument an actual demise; and although the deed should destroy the original clauses and covenants, still it is conditioned, for the performance of all the covenants in the original lease. Where one party has signed an instrument, and the other has not, the party who signed is bound, *Laythoarp v. Bryant* (b). A tenant, under the circumstances of the present case, is estopped from disputing the lessor's title, *Cooper v. Blandy* (c).—[BURTON, J. His title is not disputed, but only whether he has this remedy; and in the case of a parol demise, it is asked, could the ejectment be maintained?—By the contract here, it is plain the relation of landlord and tenant exists, and the court will prevent the defendant from saying that the deed should be construed for his benefit alone, and not for the benefit of the landlord also.

Mr. *Fitzgibbon* replied.—The plaintiff contends that his ejectment is within the 5 G. 2, and it has been argued, that that act extends to leasehold; and in support of that position, the 2d section has been read; but that section is a distinct provision, applying only to the recovery of arrears of rent after judgment in ejectment. The 25 G. 2 has also been relied on as including this case, but that act clearly shews there

(a) 13 East. 18.

(b) 2 Bing N. S. 735.

(c) 4 Moo. & Sc. 562.

must either be a clause of re-entry in the lease, or the want of it aided by statute; and for the latter purpose, the instrument must be conformable to the 5 G. 2, that is, it must be a lease of lives, or a lease for years determinable upon lives, which the deed in the present case is not. Is this deed a memorandum in writing signed by the plaintiff, within the statute of frauds? The authorities, cited to prove that a contract in writing, under circumstances, may be forced against a party who does not sign it, and may be a demise though signed by the tenant only, cannot apply where there is no such contract, and where the holding is under a lease sealed by both parties.—[CRAMPTON, J. May both instruments be taken together?—The condition cannot be apportioned. There might have been a surrender, and the parties then agree about terms for the future. A surrender for an estate for life or years in land, at common law, might be by parol without writing, *Co. Litt.* 338 a.; *Wilston v. Pilkney* (a); *Cartwright v. Pilkney* (b); and the statute of frauds requires it to be “by deed or note in writing, signed by the party so surrendering, or his agent,” but not by the surrenderee. The question then is, was the surrender accepted, or is there evidence *prima facie* of that acceptance on the record? Acceptance is commonly implied; 1st, from the making of a new lease; 2dly, it shall always be presumed until the contrary appears; so in *Thursby v. Plant* (c), citing *Thompson v. Leach* (d). Where an estate is granted, it vests in the grantee by the act of the grantor, and without any act of the grantee; unless there be a disclaimer, which it was thought should be by act on record, until the case of *Townsend v. Tickell* (e), which first decided that the disclaimer must be by deed; but it is still necessary that he should disclaim by deed. A man who once accepts or does any act of ownership, cannot afterwards disclaim, *Crewe v. Dicken* (f). In *Nicholson v. Wordsworth* (g), Lord Eldon expressed his opinion, that a release, with intent to disclaim, was in effect nothing but a disclaimer; and all the cases prove that a grantee, in order to avoid the estate, must execute a deed equivalent to a disclaimer, and in strictness that deed should be a deed poll. 4 *Blythewood’s conveyancing*, 75 & 74 note. The passage cited from *Chambers*, to shew a surrender must be accepted, has nothing to do with this case, for the question is, what is an acceptance? and the law says it is accepted, if it be not disclaimed. It is said, the surrender here is conditional; that is, it is the surrender, or in other words, the grant of an estate to be defeated by a condition annexed to the grant by the grantor, and to be taken advantage of by him. *Perkins* 624, has been cited to sustain the position, that a grantee like the

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(a) Vent. 242

(c) 1 Saun. 236 a. note.

(e) 3 B. &amp; Al. 31.

(b) 1 Vent. 272.

(d) 2 Vent. 198, S. C. : 2 Salk. 613.

(f) 4 Ves. 97.

(g) 2 Swan. 388.



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present can avail himself of such a condition ; but it does not apply, for if this be a condition at all, it is not a condition precedent to the acceptance, but a condition subsequent to the acceptance ; a condition whereby the acceptance, or rather the *effect* of the acceptance is to be defeated ; and the surrenderee in the present case did not execute the deed, and therefore it is not his deed, his words, his act, or his condition. It is admitted, that a surrender of part of the premises, if nothing more were done, would destroy the condition as to all ; that is, that it would be a release of the condition *in toto* ; but it is contended, that the condition annexed to the acceptance of the surrender, that is, to the release of the condition of re-entry, prevents this effect, and when broken, defeats the release of the condition of re-entry ; but, " if a condition be released upon condition, the release is good and the condition void." *Co. Litt.* 274 *b*. The main proposition is, that the lessor, by the acceptance of part of the premises, has defeated the condition altogether, *Winter's case* (a) ; *Co. Litt.* 202 *b* n. 2 ; *Knight's ca.* 2d *Point* (b). These authorities drive the counsel for the plaintiff to contend, that the acceptance of the surrender was upon condition, but there is no authority to support them ; but against it are *Plowden* 232, where it is stated, that the words must be his, who is to take advantage of the condition ; and *Popham* 118, where it is said, that the condition is always to him who passeth the estate and to no other. The case of *Kesteron v. Sabery* (c), has nothing to do with this case ; it only proves, that a release of debts on a condition precedent will not release the debts, if the condition be not performed ; nor has *Co. Litt.* 231 *a*, which only proves that one of two lessees who does not execute the lease, but who enjoys the land under it, shall be bound by the terms of it, and shall be jointly bound with the other lessee to pay a sum in gross, reserved by the lease. This passage cannot apply, unless the plaintiff, the non-executing party, has entered according to the surrender ; and if he has entered, this is an absolute acceptance of the surrender, and its effect cannot be destroyed by the pretended condition, which is a condition subsequent. It is argued, that because the rent is not suspended the condition is not ; but the rent is not odious, being an equivalent for the land, but the condition is, as defeating the estate ; and this point has been decided in *Hodskins v. Thornbury* (d), and by Perriam, J. in *Anonymous* (e) ; *Culco v. Sharpe* (f) ; *Lee v. Arnold* (g). *Dormer's case* was cited to shew what things can be done by consent ; but the apportionment of a condition is not one of them, and all the authorities agree, that this cannot be done by act of the parties. It has been asserted, that a condition to defeat a term of years absolutely granted, may be created by something subse-

(a) *Dyer* 309.(c) 2 *Chy.* 511.(d) *Goulsh.* 21.(b) 5 *Rep.* 56.(d) 3 *Keb.* 513.(f) *Noy.* 126, pl. 511.(g) 4 *Leon.* 28.

quent to the grant; but *Perkins* 617, is against this position. The passage in *Hudson's Landlord and Tenant*, 321, applies only to conditions which are annexed to the grant in its original creation. There is no authority for saying a deed must operate *in omnibus*; it must operate so far as its provisions are legal, and fail in parts where it controverts the law. It is said, that *Kielly v. Ahearne* decides this case, but it is distinguishable as being the case of a freehold lease, where the clause of re-entry had been destroyed by act of the party, and was then the same as if the deed was originally without such a clause, and was therefore aided by 5 G. 2; and it was also the case of a sub-lease, not of a surrender of part, and is no more than a *dictum* of the court. The reason given is a bad one, for if correct, an ejectment for non-payment of rent might be brought against a tenant from year to year by parol demise. [CRAMPTON, J. It must be taken to apply to a case similar to the one before the court.]

BURTON, J.\* this day delivered the judgment of the court.—After stating the evidence produced by both parties at the trial, and reading the proviso in the deed of 1829, he said, that upon this clause the entire question in this case turns. It is a proviso, as we conceive, amounting in substance to an agreement expressed and implied, to occupy the residue of the premises at the rent of £500 a year. It was upon the production of the deed which contains this proviso, that the defendant called upon the learned Judge to direct the jury to find a verdict for him; and upon this ground, that in consequence of what took place, the landlord lost this right, or the remedy which the deed expressly reserves to him for the recovery of his rent. The case has been ably argued upon the operation of a surrender of part of the premises, on the condition of re-entry; and we are of opinion, that such surrender operates to destroy the condition, it not being apportionable. But the refusal of the learned Judge to direct a verdict for the defendant was right, upon grounds altogether distinct, and which go upon the construction of the ejectment statutes. The question turns especially upon the 25 G. 2, c. 13, and we are of opinion, and I have not the slightest doubt on the subject, that under that statute the plaintiff had this remedy either under the two deeds or under the single deed, which is a demise at a certain rent, and for a certain term; and this surrender being a surrender of part, with a condition that all the remedies in the original lease should continue, I cannot entertain a doubt that the lessor's remedy by ejectment for non-payment of rent continued. The 2d and 3d sections of

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\* The *Lord Chief Justice* was prevented by indisposition from hearing the argument.

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the 25 G. 2 govern this case, and I cannot entertain a doubt, that the two documents compared together, and the second declaring the lands to be occupied on the same terms, and that landlord should have all the remedies in the original lease, that it is a contract in writing, expressing and constituting the relation of landlord and tenant, and ascertaining the rent reserved. There are four things required to maintain an ejectment under this act; first, there must be a minute or article in writing; secondly, the rent must be ascertained; thirdly, the lands must be shewn to have been enjoyed; and fourthly, that more than one year's rent is in arrear. These are all ascertained in this case. The question then is, whether the deed alone or taken in connection with the original lease is such a contract? and we are all of opinion that it is a contract in writing, in which they declare how they shall stand for the future, and that the lessor shall have all the remedies which he had under the lease demising the whole of the premises, and that upon these grounds there must be

Judgment for the plaintiff.

## COMMON PLEAS.\*

PRACTICE—ACTION AGAINST MAGISTRATE—GENERAL  
ISSUE—SPECIAL PLEA.

HAMILTON STEWART v. Sir W. W. LYNAR.

Mr. HOLMES applied on behalf of the plaintiff, to set aside the special plea filed by the defendant, inasmuch as all the facts spread out on that plea could be given in evidence under the general issue, and inasmuch as the plea was wholly inconsistent and unnecessary; and that same was filed for the purpose of embarrassing the plaintiff. This was an action against the defendant in his capacity of Magistrate, for an assault and false imprisonment of the plaintiff; that under the act of parliament, any special justification which the defendant had, he might give in evidence under the general issue. This plea was, therefore, wholly unnecessary. If the defendant could be deprived of any benefit, then it would be a hardship not to allow him to put his special defence on the record, but the defendant could not possibly be injured by setting aside this plea; that it was filed to embarrass the plaintiff at the trial, and to create unnecessary expense.—[DOHERTY, C. J. Does not the statute give him every defence that he would have had, if he put the special justification on the record?—It does. In an action of *assumpsit*, if the defendant pleads a special plea that amounts to the general issue, it is a bad plea. Suppose by their special justification they have tendered immaterial issues, are not all the facts traversable? and we may be going to trial on immaterial issues. This would work an injury to the plaintiff. The practice of the Queen's Bench is, where a party can give the special matter in evidence under the general issue, never to permit him to file a special plea, *Marsden v. Benson* (a).

In an action against a magistrate, the court will not set aside a special plea of justification filed in addition to the general issue, although all the special matter could be given in evidence under the general issue.

Sergeant Greene and Mr. Napier for defendant.—The plaintiff has called on the court to rescind the rule for pleading double matter in this case, on three grounds, that it is an abuse of the statute, that the plea is inconsistent and unfounded; and that all the matters stated in the plea could be given in evidence under the general issue. We admit that the court will not allow a plea that amounts to the general issue. *Mags v. Ames* (b). The case of *Carr v. Hinchliffe* (c), was an attempt to get rid of the special plea; you cannot plead a special plea which would traverse all the facts in the declaration.—[TORRENS, J. Is not that the

\* The Common Pleas cases are given *ex relatione* Mr. G. Stokes.

(a) 5, Law Rec. N. S. 22.

(b) 4 Bing 473.

(c) 4 F. & C. 547.

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same principle in all pleas of justification ?]—It is the new rules in England tend to narrow the issues : here we wish to reduce this cause of action to a specific issue, if we are deprived of the special plea, we cannot do this ; we tender them a distinct issue, whether we were acting as a magistrate or not.—[JOHNSTON, J. Did not the plaintiff serve notice on you as a magistrate before the commencement of this action ?]—He did ; we are still entitled to both pleas. In *Martin v. Kesterton* (a), the plea of not guilty, and tender of amends was allowed. It would be a manifest absurdity to say, that the magistrate should not have a benefit given by the common law, because a statute has given him another benefit.—[DOHERTY, C. J. The course pursued by the defendant may increase the expense in pleading, but will diminish it in proof ; the court must ultimately decide any question of law that arises in the case either on demurrer or on a bill of exceptions ; and are we to say, that he shall not avail himself of his common law right of a plea of justification, because he may take advantage of the right given to him by the statute ?]—It is laid down, that though this defence may be given in evidence under the general issue, yet, it is frequently advisable to plead the matter specially, as it tends to diminish the evidence on the part of the defendant (b). [TORRENS, J. Could the plaintiff reply *de injuria sua propria* ? for if he could, I think it increases the proof ; for the effect of such a plea would be, that the plaintiff would be obliged to prove every immaterial issue stated in the justification.]—This is a good plea in point of law. The facts stated in the plea are sworn to be true, and the court is called upon by a summary motion to deprive a party of his common law right ; the plea sets forth the recent statutes as to party processions in Ireland, and serious questions in law may arise on them ; and is a party to be concluded from having a decision on those points because an act of parliament has given him a greater advantage than he had before ?—[DOHERTY, C. J. The case of *Redford v. Birley* (c), which has not been cited, I think, goes much further than the present case ; there were fifty-one special pleas in that case ; they were reduced to fourteen ; and when the case afterwards came before the court, Chief Justice Best said, that all the evidence which had been given on the special pleas might have been given under the general issue.]—In the case of *Atkinson v. Carty*, there were five special pleas and the general issue, and that was an action against a magistrate.

TORRENS, J.—If I could be satisfied that the party here could not reply *de injuria &c.*, it would go a great length in changing my view of the case.

Mr. *Whiteside*, in reply, for plaintiff.—If the court think that this plea narrows the issue, then the defendant has some reason for his plea,

(a) Sir W. Black, Rep. 1093.

(b) 3 Chit. Plead. 1091 ; Com. Dig. Plead. 3 M. 23.

(c) 3 Starkie Rep. 76.

but, here the act of parliament gives him every advantage under the general issue, which he could have under this special plea, in which there is not one new fact put forward; they have not shewn that he would be deprived of a single advantage, by giving every fact stated in that plea in evidence under the general issue. The authority relied on where a magistrate is justified under a warrant: here there is no such thing. The offence charged is "intending to parade in procession." The act expressly states; that the party must be apprehended under a warrant. This is a motion to the discretion of the court, and if the court sees that by permitting this plea to stand, a great mischief and inconvenience arises to the plaintiff, and no advantage whatever to the defendant, they will expunge it. I think the replication *de injuria* in this case would be good, for, unless the matter be derived through the plaintiff himself, you cannot new assign. In England this plea would not be permitted; it must occasion unnecessary expense to the plaintiff; and where the rule in England has been, before and since the new rule, to disallow a plea like the present, and in the absence of any case where, in an action like the present against a magistrate, the two pleas have been allowed, the court ought to set aside this plea (a).

TORRENS, J.—As it is not likely that the court will come to a unanimous opinion on this question, it becomes necessary to give the individual opinion of each member of the court. I think, that the practice of the Queen's Bench in this country and in England, before and subsequent to the new rule, has been invariably not to allow a party to put in, in addition to the general issue, a special plea, where it amounts to the general issue. I take it now, that there is no difference between the case of a magistrate and any other individual. It is the usual course to allow a party a special plea, where he can shew the facts stated in it could not be given in evidence under the general issue. It is suggested that it is for greater security that the defendant has filed the special plea in this case. Is there any advantage which he could have, that he has not under the general issue? He can raise every question of law, as well on a bill of exception, as he could under a demurrer to the special plea, and therefore the advantage to be derived by the defendant is no more than if this plea had never been filed, for he has an equal opportunity of having the opinion of the court upon all the points given in evidence at the trial. No case has been cited, where, in an action against a magistrate, a plea like the present has been allowed. It was on that ground, I pressed the counsel for the defendant whether a replication *de injuria* could be filed to this plea. The CHIEF JUSTICE has cited an authority, which certainly did, at first, strike me as analogous to the present case, but, I find that in looking into it, I cannot

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(a) Tykes v. Reeves, 6 Dow. Prac. case 334; Dawson v. M'Donald, 2 Meeson and Welsby 26.

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bring my mind to the same conclusion that he has done. Chief Justice Best uses the words *might have been given* in evidence under the general issue; that is not saying that all the evidence, which could have been given under the special pleas, might have been given under the general issue. It has been said, that the plaintiff may go down to trial on the plea of the general issue, and let the other pleas be decided afterwards. This practice, I think, is attended with much inconvenience, mixing up the question of law and fact, before the question of law has been cleared off: but going down to trial, in the first instance, seems to me, to increase unnecessarily the expense to the plaintiff, and must tend to harass the party who thus goes down to trial.

JOHNSON, J. fully concurred in what had fallen from his brother TORRENS, and did not see any advantage that could accrue to the defendant, by permitting this plea to stand, but a very great injury might be worked to the plaintiff; he could not imagine why the defendant insisted on retaining this plea where it cannot be shewn that any benefit whatever could result to defendant, nor any advantage which he would not have under the general issue.

MOORE, J. differed in opinion from JOHNSON, J. and TORRENS, J. The statute, in this case, gave an additional benefit to a magistrate of pleading the general issue, and giving the special defence in evidence at the trial. Is it to be said, that because the party has this benefit conferred on him by the statute, he is to be deprived of his common law right of pleading specially, if he thought proper to do so? The plaintiff, by this plea, has the advantage of meeting this case on the special issue raised by it. Is this a disadvantage? It has been said, that this plea is put in for the purpose of raising a demurrer. There never was a case in which a question at law was more fit to be raised by a demurrer than the present. This plea gives him every opportunity of meeting the case, either before he goes to trial, or after the trial. It is unnecessary for me to advert to the case cited, in the course of the argument, by the CHIEF JUSTICE. I think it is conclusive on the present case, and I cannot agree with the other members of the court in the objection which they have raised as to that case. I think the words of the judgment of Chief Justice Best are, "that all the evidence which had been given in that case, might have been given under the general issue;" and, therefore, I think this special plea must be allowed to stand.

DOHERTY, C. J.—By this motion, we are called on to correct what is alleged to be an improper use of the statute, which enables a party to plead double matter. We are required to rescind the order by which the defendant was permitted to plead a special plea of justification in addition to the general issue, and to take that second plea off the file, for the reasons stated in the notice.

This motion has been urged chiefly on the ground, that as the defendant is a magistrate, and, as such, enabled by the statute to give any special matter of justification in evidence under the plea of the general issue, he, therefore, ought not to be allowed to resort to a special plea. Whatever difference of opinion exists in the court with respect to the other grounds on which this motion has been rested, all the members of the court are, I believe, unanimously of opinion, that the case of a magistrate does not differ from that of any private individual; that the statute of *Charles*, which permits him to avail himself of any matter of defence or special justification, under the plea of the general issue, was intended to confer a boon or privilege on the magistrate, and to facilitate his mode of defence, and not to deprive him of any benefit which he might derive from a special plea, or to preclude him from pleading such, in any case where he might deem it advantageous to resort to special pleas, and where any other individual would be allowed to do so. Having once established that there is no difference between the case of a magistrate and a private individual, that goes far to decide this motion; for, is there any law or practice which peremptorily pronounces that a defendant, in an action of trespass, may not resort to a special plea of justification, in addition to the plea of the general issue? I think that no such rule or practice exists; and the case of *Redford v. Birley*, which I called for in the progress of the argument on this motion, goes, in my mind, the full length of establishing, that a party *may* plead special pleas of justification, in addition to the plea of the general issue, even where the matter stated in the special pleas may be given in evidence under the plea of the general issue. That case was very fully considered, and was brought before the court on more occasions than one. There, the defendant, in an action of trespass, pleaded the general issue, and fifty-one special pleas of justification. On a motion made by plaintiff, it was referred to the Master to expunge such pleas as he might deem to be superfluous. The Master struck out thirty-seven of those pleas, and the case afterwards went down to trial on the general issue and fourteen pleas of special justification. After the trial, Best, C. J., in delivering his judgment, stated, "that all the matter that has been adduced in evidence might have been gone into on the general issue." The defendant's counsel have been asked to produce any case, in which a magistrate has pleaded both the general issue and a special plea of justification; and they have not, on the moment, been able to supply any such; but, without admitting that none such are to be found, I confess I am not surprised at this; neither does the want of such a precedent influence me much—for, when the magistrate is permitted to avail himself of the general mode of pleading, it is not astonishing that he should, generally speaking, prefer availing himself of such privilege; nor can I perceive what cause for complaint the plaintiff has, because the defendant in this

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case, chooses to put in a special plea ; it furnishes his opponent, in detail, with the matters of defence on which he intends to rely ; it prevents any surprise. If there be any single matter of fact stated which the plaintiff controverts, he may, if he chooses to do so, take issue on that ; or if he thinks that the entire plea does not furnish any defence in point of law, he may, by demurring to it, put that in a due course for decision ; but we are called on to rescind an order, allowing the defendant in this case to plead double, and to take this special plea off the file, for the reasons stated in the plaintiff's notice. Supposing that I am right in the views I have hitherto taken, viz., that the case of a magistrate does not differ from that of any other individual, and that it is competent for a defendant in an action of trespass to put in special pleas of justification in addition to the plea of the general issue, I confess I do not see any ground for our taking this particular plea off the file, and condemning it on this summary application. If this be a bad or defective plea, the plaintiff is not without his remedy : he may demur to it, if he thinks proper. Had the defendant put in a vast number of special pleas (as in the case of *Redford v. Birley*, there were fifty,) his conduct might be represented as oppressive and vexatious ; but here, where there is but one special plea, and that of no extraordinary length, the court cannot be called on to interfere on the ground of appearing vexatious ; neither need the plaintiff be apprehensive that he will suffer inconvenience or delay as suggested by his counsel, if he should deem it advisable to demur to this plea ; for, under the circumstances of this case, the court would not be likely to restrain him from going down to a trial of the matter of fact. For these reasons, I agree with my brother MOORE, that this motion should be refused ; but, the court being divided, we must say,

No rule.

*Wednesday, January 23d.*PRACTICE—NOTICE TO CHANGE VENUE—ACTION  
AGAINST MAGISTRATE.

HAMILTON STEWART v. Sir W. WAINRIGHT LYNAR.

Sergeant GREENE, applied, on behalf of the defendant, to change the venue in this case, from the county of Monahan to the county of Dublin, or some adjacent county.

This was an action of assault, and false imprisonment, against the defendant in his capacity of magistrate. The defendant in his affidavit stated that he had been sent down to suppress party processions, and that his instructions were to preserve the peace of the town; that eight different actions have been commenced against him, for acts done by him as a magistrate on that occasion; that since 12th July, he has received anonymous letters, bearing the Monaghan post-mark, stating, that his pay would not be sufficient to liquidate his law expenses; he swears, that he believes these several actions have been commenced for the purpose of harassing and oppressing him; and that from these circumstances, and the high party and religious feelings that at present exist in the county Monaghan, he does not think that he could have a fair and impartial trial in that county; the right of the party is to bring his action where he chooses; in transitory actions, the court will change the venue when there are grounds to think there will not be a satisfactory trial, *Mylock v. Saledin* (a).

The court will change the venue to an adjoining county in an action like the present, if there be reasons to suppose that a satisfactory trial cannot be had in the county where the venue is originally laid.

Mr. *J. Whiteside*, for plaintiff.—A consent has been sent to plaintiff, to change the venue to the county Dublin, which we refused; it would be ruinous to the plaintiff, a man in humble life, by the expenses of witnesses, &c.; but it is a mistake to say this is a transitory action; it is purely a local action, and the party is compelled to bring it in the county where the imprisonment took place (b). The court will never allow the venue to be changed on such showing as the present. A party must show facts. It is not enough to state, that he thinks he cannot have a fair trial. A party who comes before the court must make out a clear case in his affidavit: has he done so here? He does not even pledge his belief to the fact, that he cannot have a fair trial: reports and general statements not sufficient to sustain his case, *Chandlers' Co. v.*

A general swearing, as to apprehension and belief that a prejudice exists, is not sufficient, *King v. Harris and others* (c).

(a) 3 Bur. 1564; 2 Chitty

(b) Chitty's Prac. 1903.

(c) 3 Bur. 1331.

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DOHERTY, C. J.—This case does not turn on *the affidavits*, if the court sees any good reason why it is satisfactory to have a trial in another county. We will send it to Armagh.

Order.—Let the venue be changed to Armagh: costs to abide the event.

Thursday, January 24th.

PRACTICE—AMENDMENT—SHERIFF'S RETURN TO  
*SCIRE FACIAS*.

Executors of O'BRIEN v. FITZGERALD and others.

The court will order the Sheriff to amend his return to *sci. fa.* if it appears that any person having an interest has not been returned as served.

Mr. *T. Jennings* applied, on behalf of one of the defendants, that the sheriff of the county Mayo should amend his return, by inserting his name in the return of the persons summoned under the writ of *sci. fa.*, that he had been served with the notices and orders, but was not returned by the sheriff; and also, for ten days time to plead. That he was the person most interested in disputing the plaintiffs' demand.

John Fitzgerald was the second son of the cognuzor of the judgment, not the heir, and he came in as a purchaser for valuable consideration.

Mr. *Charles O'Malley* for the plaintiff.—The parties have all appeared by one attorney, and whatever be the defence of one will be the defence of all; they have come in to ask a favor of the court, which must be on the terms of their not demurring to the *sci. fa.*, and pleading issuably, and paying us the costs of this motion.

DOHERTY, C. J.—This is not the case of a party coming in, merely to ask a favor of the court, but it is a party having an interest, who has not been served, coming into this court, and making a complaint against the sheriff, founded on allegation of imperfect service, which is not denied.

Mr. *T. Jennings*.—We called upon the plaintiff by notice, to amend the return, and that notice was served on the plaintiffs' attorney, who is also the returning officer for the county Mayo.

*Per Curiam*.—Let the return be amended, the defendant undertaking to plead in four days, and no costs of this motion.

*Tuesday, January 25th.*

**PRACTICE—COSTS OF SPECIAL JURY—ACTION OF SLANDER.**

**COGHLAN v. CARNEY.**

Mr. JENNINGS applied, on behalf of the plaintiff, that the defendant should pay the costs of the special jury in this case. This was an action of slander. The defendant applied for a special jury. A trial was had at the last assizes for the county of Mayo, and the plaintiff got a verdict, with six-pence damages. The judge did not certify; the plaintiff paid the jury twelve guineas. The action being for oral slander, the plaintiff could get no more costs than damages. The plaintiff applied to the defendant to pay those costs, and, upon his refusal, the present application became necessary. He relied on the 27th sec. of the 3 & 4 W. 4, c. 91,\* as conclusive that the plaintiff was bound to pay those costs to the defendant.

The party applying for a special jury must pay costs of same, unless the Judge certifies, even in a case where there are no more costs than damages.

Mr. *Monahan*, for defendant, submitted that the plaintiff should have applied to the Judge for a certificate, at the time of the trial, and that this being an action of slander, where the party only recovered six-pence damages, he was entitled to no more costs; and that the section of the act referred to meant to apply only to those cases where the party would have been entitled to the costs of a common jury. Here he is not entitled to any costs beyond the damages found; and that the certificate was only necessary for a party, where he succeeded, for the purpose of taxing those costs against the opposite party; and he also insisted that the plaintiff here should have applied to the Judge at *Nisi Prius* for those costs.

TORRENS, J.—That would be withdrawing the matter altogether from the jurisdiction of the court, and placing it in the hands of the Judge at *Nisi Prius*.

\* 3 & 4 W. 4, c. 91, s. 27:—"And be it further enacted, that the person or party who shall apply for a special jury, shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the case by the same, and shall not have any further or other allowance for the same upon taxation of costs, than such

"person or party would be entitled unto, in case the cause had been tried by a common jury, unless the Judge before whom the cause is tried shall, immediately after the trial, certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

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DOHERTY, C. J.—There is a clear and plain course pointed out by the section of the act of parliament referred to, to be pursued at the trial. The defendant here has had the benefit of a special jury; and it is manifest, under this section of the act, that the plaintiff must have those costs so incurred against the defendant; and although this has been stated to be a new case, yet, it is so clear a case, and bearing in mind the notice served by the plaintiff, we must grant the motion, with costs.

Let the defendant pay to the plaintiff the costs of striking the special jury, and all the expenses occasioned by the trial of this case by a special jury, and the costs of this motion.

## EXCHEQUER OF PLEAS.

Monday, January 14th.

## PRACTICE—AFFIDAVIT TO HOLD TO BAIL—PARTNER.

HORWOOD and another v. POWER.

The defendant was arrested and held to bail on the following affidavit of debt:—

"George Horwood of," &c., "maketh oath and saith, that William Power is justly" &c., "indebted unto Henry Gunther, this deponent's *late partner in trade*, and this deponent, in the sum of £158, for goods sold and delivered by the said Henry Gunther and this deponent, during their late partnership, *to and for* the said William Power, and at his request. And this deponent further saith, that the said sum still remains justly due and owing to the said Henry Gunther and this deponent, over and above all just and fair credits and allowances," &c.

The usual rule having been obtained to shew cause of bail,

Mr. *Macdonagh* now objected to the affidavit as defective; first, in the use of the words "to and for," which rendered it uncertain. It might imply either that the goods were sold *to* the defendant, or that the plaintiffs and defendant stood in the relation of consignees and consignor, and that the goods were sold by the former, *for* and on account of the latter. In support of this objection he cited *Bell v. Thrupp* (a); *O'Neill v. Mayne* (b); *Snell v. Anderton* (c); *Cathrow v. Hagger* (d); *Taylor v. Forbes* (e); *Visger v. Delegal* (f).

An affidavit to hold to bail by one of two plaintiffs, stating that W. P. (the defendant) was indebted "unto H. G. this deponent's *late partner in trade* and this deponent, in the sum of £158 for goods sold and delivered by the said H. G. and this deponent, during their late partnership, *to and for* the said W. P. and at his request," Held to be sufficient.

PENNEFATHER, B.\*—I quite agree that the affidavit should be framed with certainty and precision, but taking the words "to and for" in conjunction with the context, it seems clear that the sale and delivery of the goods are the foundation of the debt, and that the meaning of the affidavit is, that the goods were sold and delivered *to* the defendant. This, therefore, is an objection to which I cannot yield.

Mr. *Macdonagh*.—The second objection to the affidavit is, that it

\* *Solus*.

(a) 2 B. & Al. 506; S. C. 1 Chit. Rep. 331.

(c) 3 M. & P. 269.

(e) 11 East 316.

(b) 1 H. & B. 98.

(d) 8 East. 100.

(f) 2 B. & Ad. 511.

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states that the goods were sold and delivered by deponent and his late partner; in the case of *Edgar v. Watt* (a), a similar affidavit was held insufficient; Patteson, J., observing, that it did not appear whether there had been a dissolution of partnership, or whether the partner was dead.

Mr. *Armstrong*, *contra*, was stopped by the court.

PENNEFATHER, B.—From the statement in this affidavit, it must be intended that both partners are alive. The cause of bail must therefore be allowed, but as the cases cited by Mr. *Macdonagh* shew that there were strong reasons for supposing the objections taken to the affidavit to be sustainable, it must be without costs.

Cause of bail allowed without costs.

(a) Har. & Wol 108,

*Monday 14th, Tuesday, 15th, and Tuesday 22d January.*

#### CHANGE OF CURRENCY—RENT—LEASE—COVENANT.

NEVILLE v. PONSONBY.

In 1721, a lease was made of lands in Ireland for a term of 999 years, reserving a rent of "£100 sterling current and lawful money of Great Britain;" the currency of Great Britain and Ireland being then the same. Held, that notwithstanding the 6 G. 4, c. 79, the rent was not payable in British currency.

COVENANT by the assignee of the reversion, against the assignee of the lessee. The declaration stated, that one Thomas Head being seized in his demesne, as of fee, on the 13th of July, 1721, by indenture of lease made in the county of Kilkenny, the date whereof was the day and year aforesaid, demised to one Henry Ponsonby, his executors, &c., certain lands situate in the county Kilkenny, to hold from the 25th of March then last, for the term of 999 years, "yielding and paying therefore, yearly and every year, to the said Thomas Head, his heirs and assigns, the clear yearly rent or sum of £100 *sterling, current and lawful money of Great Britain*, (equal to the sum of £100 present currency,) moietywise, by two even and equal portions, at or upon the two usual days of payment in the year, that is to say, £50 sterling, of the like lawful money of Great Britain, on the 29th day of September, and £50 sterling, of the like lawful money of Great Britain, on the 25th day of March, yearly and every year, during the said term." The declaration then stated, that Henry Ponsonby, the lessee, for himself, his executors, &c., covenanted to pay "the said yearly rent of £100 sterling, as aforesaid, at the "several days and times therein before limited and expressed for payment thereof." After stating the entry of the lessee upon the demised premises, the declaration (which by consent was in the short form) aver-

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red, that the reversion by mesne assignment had become vested in the plaintiff, and the interest of the lessee in the defendant. Breach assigned—that on the 25th of March, 1837, the sum of £50, of the rent aforesaid, for one half year of the said term, ending on the day and year last aforesaid, became due, and still was in arrear and unpaid to the plaintiff, contrary, &c.

The indenture of lease declared on, which was set out upon *oyer*, bore date the 13th of July, 1721, and purported to be made between Thomas Head, of Head's Grove, in the county of Kilkenny, Esq., of the one part, and Colonel Henry Ponsonby of Woodtown, in the county of Waterford, of the other part. The indenture witnessed that the lessor, “for and in consideration of the sum of £325, to him in hand paid by “the lessee, by way of fine, and of the yearly rent therein reserved, and “also of the covenants, &c., thereafter mentioned and expressed, &c,” demised unto the said H. Ponsonby, the lessee, certain lands and premises, situated in the county of Kilkenny, and particularly described in the lease. The *reddendum* and covenant for payment of the rent reserved were respectively as stated in the declaration.

The defendant pleaded a tender on the 25th of March, 1837, (the day on which the rent in the declaration mentioned was due and payable,) of £46. 3s. 1d. “of lawful money of present currency, being equivalent to the sum of £50 of late currency, which was the half year's “rent due and payable under and by virtue of the lease in the declaration mentioned, to receive which of the said defendant, the said plaintiff then and there refused,” &c.

To this plea the plaintiff demurred, upon the ground, that although it professed to be an answer to the whole declaration, it was in fact an answer only to part.

*Joinder in demurrer.*

Mr. *E. Pennefather*, jun., in support of the demurrer.—The simple question for the adjudication of the court is, whether rent, reserved by an indenture bearing date in 1721, is in point of law discharged, at the present day, by a payment in Irish currency? It is submitted that it is not, as will be seen by a brief reference to those changes which have taken place in the currency, and which appear more materially to affect the present case. Prior to 1637, the money current in England was current in Ireland, at 1-4th more in Ireland than it was in England. In 1637, the currency was by proclamation placed on the same footing in both countries. By proclamation, in 1737, the currency was reduced, making the money of England current in Ireland, at 1-13th more than in England. That so continued until 1826, when the 6 *G.* 4, c. 79, the act for restoring the uniformity of the currency in both countries,



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was passed. This then is a lease executed at a time when the currency in both countries was the same;—when the proclamation of 1637 was in force, wherein it is recited that, “whereas it is observed, “that great uncertainty sometimes ariseth in the interest of the subjects, touching reservations of rents or annuities, bills, bonds, contracts, and other agreements, made between party and party for payment of monies, which is interpreted to be Irish, if the word sterling or English be wanting.” And whereby it is provided that, “all “reservations of rents, bills, bonds, contracts, and all other agreements “after the first day of May next, to be made and contracted between “party and party for moneyes, shall be understood and interpreted to be “English, though the same have not the word sterling or English “added to them, and that they be accordingly so adjudged by all his “Majesty’s Judges, and others whom it may concern, when and as often “as any controversie of that kind shall rise before them.”\* Had the *reddendum* been here simply “yielding and paying £100,” the landlord would have been entitled to demand, and the tenant bound to pay £100 English, by force of the proclamation of 1637. But the *reddendum* is “yielding &c., £100 sterling, current and lawful money of Great “Britain.” The words are plain and unambiguous, and even if there was an ambiguity, the proclamation would give a certainty to the meaning. It cannot be said that a man discharges himself from liability, because by words plain and unambiguous he contracts to do that which the law imposes upon him. It cannot be said, that this is £100 Irish, to be paid in English coin:—1st, that would be contrary to the proclamation of 1637. 2dly, the contract is not to pay £100 *in* current and lawful money of Great Britain, but it is to pay £100 “sterling, current and lawful money of Great Britain.” When the proclamation of 1737 was issued, the landlord was obliged to receive his rent, reduced by 1–13th, and that so continued until the uniformity of the currency was restored by the currency act.† The effect of that act was, to place the parties to this lease, or those representing them, in their original position. That act provides that all payments are to be made according to the currency of Great Britain, except in the cases that are therein specially excepted. The question then is, does this lease come within the exception? The enactment as regards leases is in the following words:—“all debts, due “or to grow due under or by virtue of any lease which shall have been “executed at any time before the commencement of this act, *according “to or with reference to the currency of Ireland*, shall be paid according “to the amount thereof respectively in such British currency, to be cal-

\* See this proclamation set forth at length, Lloyd and Goold’s Rep. Tempore Sugden, 351 n.

† 6 G. 4, c. 79.

"calculated in manner following," i. e. by payment in British currency of 12-13ths of the amount according to the Irish currency. That exception is beside the present question. This is not a lease executed with reference to Irish currency; it is a lease executed at a time when the currency in both countries was the same. That section relates merely to those leases that were executed at a time when the currency was different in both countries, as when the proclamation of 1737 was in force. The object of that section was, to enable persons to fulfil their contracts according to their intention, not to legalize the violation of them. For example, to enable a person who had contracted to pay £100 Irish, to discharge his liability by payment of its equivalent, £92. 6s. 1½d. British, to prevent his being called upon to pay £109 Irish. If this section then is put out of the case, the act has the effect of a simple proclamation restoring the currency to the same footing in both countries; and then by the principle in the *Mixed Money Case* (a), the debt is to be discharged in the currency of the day, when it became due. But this rests on higher ground, the contract of the parties; "and "in Ireland there may be a contract to pay a sum in English money," *Sprowle v. Legg* (b). Two or three cases appear to bear on the present,—the first is *Lansdowne v. Lansdowne* (c), which is not relied on as a direct authority, as the money charged was, in that case to be paid in English currency, in consequence of the place where the settlement was executed, and of the residence of the parties, notwithstanding the proclamation of 1737; but there exists an analogy between that case, and the present, viz., that at the time the deeds were executed in both cases, the proclamation of 1737 did not affect the parties. When the proclamation of 1737 was issued, the parties to this lease were bound by it: but that is now at an end, and there is no provision or exception in the 6 G. 4. c. 79, to affect the parties, and there exists this difference between that case and the present, which is in favor of the plaintiff here, viz., that "in that case there was no contract for payment; the right existed only in the charge," which is taken notice of by Lord Cottenham in giving judgment in *Noel v. Rochfort* (d). Here, there is a distinct contract under hand and seal. The *Case of the Solicitors and Attornies* (e), at first, appears an authority against the plaintiff. As to that case, it was decided on the 4th section of the 6 G. 4. c. 79; when an attorney is retained, he contracts certain duties; and for the discharge of them he is entitled to certain fees; by virtue in some cases of acts of parliament, or rules of court, and in other cases by a sort of prescriptive right. The fee being so regulated and ascertained by some of these modes, it is not competent to the attorney to increase it, or to the suitor to diminish it.

(a) Davis's Reports, 72.

(b) 1 B. &amp; Cr. 17.

(c) 2 Bligh, O. S. 60.

(d) 10 Bligh N. S. 524.

(e) Lloyd &amp; Gould's Rep. Temp. Sugden, 349.

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Here, the debt is incurred by the contract of the parties, competent to make their own bargain; having fixed its amount they must abide by it. If the decision in the *Case of the Solicitors and Attornies* had been different, a great inconvenience would have arisen. To some of the fees in a bill of costs an attorney might be entitled, under a rule of court made when the currency was the same in both countries. To the next item, he might be entitled under an act of parliament, passed at a time when the money current in England was current in Ireland, at 1-13th more than it was in England; so, that before he could make his demand, he must ascertain at what time the right to make the charge was originally given. Sterling money means British currency, *Lord Ormonde v. Cope* (a). *Noel v. Rochfort* is an authority in favor of the plaintiff. In that case the facts appear by the Chancellor's judgment (b). It may be said on the other side, that the currency was changed between 1637, and 1737. It must be admitted that changes did take place, and that *James 2* made current a very base coinage; but in the proclamations issued by him, making such coin current, there is an express provision that it was not to continue long, that it was shortly to be decried, and when decried, the persons holding the base coin were to be repaid in gold and silver of the current coin of the kingdom, to be given by the crown in satisfaction.—[Counsel here referred to 3 *Proc.* 1689, and 3 *Proc.* 1690.]—*James* did not remain on the throne long enough to fulfil his intention, but when *Wm. 3* came to the throne in 1690, his first proclamation was to decry the brass, copper, and mixed metal coins, after the 26th Feb. then next. Another coin of a debased kind has gained considerable notoriety from the *Drapier's Letters*, I allude to *Wood's halfpence*; but it could never have been intended by the landlord or contemplated by the tenant, that a rent of £100 per annum was to be paid in copper coin. *Wood's halfpence* were of a very debased kind; after the petition to parliament against the patent, and after Sir Isaac Newton's report, then master of the mint, it is impossible to contend the contrary; but they are out of the question, as the patent to Wood bears date in 1722, while the lease in the present case bears date in 1721.

Mr. George, and Mr. Richard Moore, Q.C., in support of the plea.—This question is of general importance, affecting large tracts of land in Ireland, and the plaintiff's construction of this contract, would add 1-13th to the rents of a large proportion of the landlords of this country. The reservation in this lease is in terms, "£100 sterling, current and lawful money of Great Britain," but the construction

(a) 3 Law Rec. O. S. 88. 111. (b) See the observations of the Lord Chancellor, 10 Bligh N. S. pp. 515, 520, 521, 522, 524.

put on this expression by the defendant is consistent with the preamble and enacting part of the late currency act; it preserves the faith of existing contracts, and does not disturb the relation of debtor and creditor; this construction is, that the words "sterling, current and lawful money of Great Britain," refer to coin not currency, to the kind of money, gold or silver, in which the rent is to be paid, and not to its value, with reference to the currency of any particular country. If this contract is to be interpreted according to the intention of the contracting parties, uncontrolled by any peculiar meaning to be attached to the terms in which it is expressed, there is no question that it must be governed by the *lex loci*, the law of the country where the contract was made; the subject matter of the contract is Irish; the parties to it are Irish, and its stipulations are to be performed in Ireland; and it would be rather a strange construction, to say that the money to be paid (the very substance of the contract) should be English. This is in fact peculiarly an Irish contract. It appears on the face of the lease as set out upon *oyer*, that the lessor and lessee were both resident in Ireland; and it is therefore to be presumed, until the contrary be shewn, that the contract was made in Ireland. It is also a lease demising lands situated in Ireland, and the rent issues out of these lands. It is clear from the second section, and indeed from every part of the late currency act 6 G. 4, c. 79, that the object of the legislature was to look to the intention of the parties who made the contract, and to preserve inviolate contracts then existing. The cases which have been cited as authorities for the plaintiff, were decided partly on some supposed virtue in the word sterling, as presumed in England to denote, *ex vi termini* English currency; a construction which has never been allowed in this country, where the printed forms of bonds, which are always conditioned in terms for the payment of so much "lawful money of Great Britain," have been uniformly held to be in substance conditioned for the payment of Irish currency, and the officers of this court would not issue execution upon a judgment entered on such a bond, for a greater amount than the Irish currency; but the cases cited were decided principally on their peculiar circumstances, indicating the intention of the parties, and are in fact strong, though indirect authorities for the proposition we maintain, namely, that the intention of the parties is to be collected from the instrument itself; and that, inasmuch as every circumstance connected with this contract has reference to Ireland, the pecuniary reservation it contains is to be taken to be in the currency of the country, though nominally in that of Great Britain. In *Lansdowne v. Lansdowne* (a), a jointure was charged on lands in Ireland, but the parties to the settlement, the trustees named in it, and the person in whose favor the jointure was charged, were all English and resident in that

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country; and the decision proceeded on the plain ground that it must have been the meaning of the parties, that this jointure should be paid in the currency of the country where the parties lived, where the contract was entered into, and where the money was to be paid. In *Noel v. Rochfort* (a), a London Banking House advanced to Mr. Rochfort, resident in Ireland, £10,000 British currency, secured by bonds and judgments executed and entered up in Ireland, but the obligees were described as of London, and of course the payment was to be made to them there. It was held in that case, that the question of what was due on the security could only be answered by looking at the origin of the transaction, and the contract between the parties. The origin of the contract was the advance of £10,000 English money, and such a debt under such a contract could not be satisfied by a payment in Irish currency. The case of *Phipps v. Lord Anglesea* (b) proceeded on nearly similar grounds, and decided, that though the charge was on lands in Ireland, it was, under the special circumstances, indicating the intention of the parties to be satisfied in English currency. In *Lord Ormonde v. Cope* (c), some stress was, no doubt, laid by Sir A. Harte on the word "sterling," on a supposed analogy to the distinction between sterling, and a currency in the West Indies, but the broad ground of decision was the same as that in *Lansdowne v. Lansdowne*, viz., that the jointress was resident in England, and must, upon her marriage in that country, be presumed to have contracted for the payment of her jointure there, and in the currency of that country.

Whatever, then, may have been thrown out in any of these cases on the peculiar force of the word *sterling*, was beside the real ground on which they were decided. But independently of the usage alluded to in respect of bonds, it has been expressly decided in this country, that "sterling" does not, *ex vi termini*, mean British currency. In *Coates v. Cotter* (d), the Master of the Rolls states he cannot agree with the proposition, that before the passing of the 6 G. 4, c. 79, the word sterling, in an instrument executed in this country, can, of itself, be taken to mean any thing but sterling money current in Ireland; and in a late case, of *Scully v. Codd*, and *Scully, Minors*, on a reference to the Master, to report whether, in a renewal of a lease of 1699, (in which the word sterling was used,) to be executed by the Marquis of Waterford, the rent and renewal fines should be English or Irish currency, Master Henn reported that the renewals should be in Irish currency. This report was afterwards confirmed, and the renewals executed accordingly. There is also a late case in the court of Queen's Bench, *Ladbroke v. Biggs* (e),

(a) 1. Bligh N. S. 413.

(b) 5 Vin. Ab. 209, pl. 8.

(c) 3 Law Rec. O. S. 88, 111.

(d) Crawford & Dix. 67.

(e) Batty, 119.

in which the meaning of the word sterling in this country is fully considered.\*—[RICHARDS, B. Was there any peculiar kind of money appropriated to Ireland at the time of the execution of this lease?—Yes; and it is conceived that the meaning of the reservation in the lease was, that the rent should be paid in *gold and silver* coin, and not in a debased currency. Ireland had, from the earliest period, been deluged with a variety of base coin; the Crockards and Pollards of the Henrys and Edwards, the mixed money of Elizabeth, the gun money of King James, and Wood's halfpence in the reign of George, which were in circulation about the very period at which this lease was made; and it was of great importance to point out in express terms in leases, that the rent was to be paid in pure gold or silver, the lawful money of England, as contradistinguished from the adulterated coin of Ireland. The celebrated letters of the *Draper* afford, in many passages, an almost contemporaneous exposition of this lease, pointing out that the tenants in those days were obliged by their leases to pay sterling, which is said to be lawful current money of England; and lawful metal or money is defined by Lord Coke to mean gold or silver, in contradistinction to brass or copper, or other base metals, which are unlawful or false metal. 2*d* Institute. 576–7; stat. Hen. 4, c. 4; 9 Edw. 3, c. 3. The power of the Crown to compel the subjects to take money in payment extends only to gold and silver. It might, it is true, by proclamation, put into circulation a debased currency, *ex gr.* of copper or brass; but the subjects were not, nor could they by law, be compelled, by the prerogative of the Crown, to accept this base metal in discharge of their contracts.—[RICHARDS, B. Did not the *Mixed Money Case* decide the contrary?—It did; but on that point its authority has been always doubted. The only legal tender has been invariably gold and silver, and it requires an act of parliament to substitute a base metal or a paper currency (as in the case of Peel's acts,) for this. The *Mixed Money Case*, which has been referred to, decided, however, amongst other things, that a contract to pay “£100 sterling, current and lawful money of England,” might be satisfied by a payment of coin, the circulating medium of Ireland; and it may well be called lawful money of England, 1st, because Ireland is *quasi membrum Angliæ*; 2nd, because it is coined in England. See particularly the fifth resolution in that case (a). From all these cases, it would appear that the words “sterling, current and lawful money of Great Britain,” do not of themselves import English currency, but that the contract is to be interpreted according to the circumstances of the case and the intention of the parties: which in this case plainly

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(a) Davis's Rep: p. 59.

\* See also, *Sprowle v. Legge*, 1 B. & Cr. 16; and *Picardo v. Machado*, 4 B. & Cr. 886.

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shew the contract to have been in the currency of Ireland, at the time this lease was executed. On general principles, therefore, the construction put on the words of this lease by the defendant is clearly right; and it remains to be considered how this construction is affected by the state of the currency at various periods in this country, by the proclamations which have from time to time been issued, and by the late act of the 6 G. 4, which was passed to regulate the currency in this country. Previous to the year 1465, 5 *Edw.* 4, the currency of England and Ireland was the same; and from that time till 1637, the currency of Ireland was depreciated one-fourth.\* In 1637, Strafford's proclamation was issued, assimilating the currency of the two countries, and assuring to direct, amongst other things, "that all reservations of rents, &c., to be contracted between party and party for money, should be interpreted to be English, though the word sterling, or English, were not used." It is unnecessary for the defendant's argument to consider how far this was a valid proclamation, or whether the currency did, in fact, by virtue of this proclamation, continue the same till 1737, subsequently to 1721, the year in which this lease was executed,† inasmuch as these facts have been assumed by the plaintiff in his argument; and if the plaintiff be right in this, it would follow, that as the currency of the two countries was identical, no peculiar meaning or efficacy is necessary to be attributed to the words "current and lawful money of *Great Britain*," as indicative of British, in contradistinction to Irish currency. In this sense, the words would be mere surplusage; but if taken to indicate the kind of coin in which the rent was to be paid, they would have an adequate and useful meaning. If the terms of the reservation were "current and lawful money of *Ireland*," or "current and lawful money" generally, there can be but little doubt that the rent would be payable in *Irish* currency; and the question, therefore, is, whether the words

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\* See the valuable work of *Simon on Irish Coins, passim*, Davis's Rep. 57, 59; and Lloyd & Goold, *tempore* Sugden, 350.

† The validity of this proclamation has been questioned, inasmuch as it assumes a power in the Crown not warranted by law, of regulating contracts between party and party; and the proposition, that the currency of the two countries remained the same until 1737, by virtue of this proclamation, is contrary to the fact, as several proclamations, effecting changes in the currency, were issued in 1674,

1677, 1683, 1689, and 1695, by King *William* and others. That the proclamation of 1689, at all events, was acted on and considered binding, appears from the fact, that it fixed the English half-crown at 2s. 8½d., the shilling at 1s. 1d., and the sixpence at 6¼d.; and by this proclamation of 1689, the silver currency was regulated, until the passing of the late currency act, the proclamation of 1737, affecting the gold currency only, without attempting to alter the value of the silver coin. See *Simon on Coins*, &c.

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"Great Britain" can have any effect on this contract? It has also been conceded, in the argument of the plaintiff, that if this lease had been made since the proclamation of 1737, which again changed and made a difference between the currency of the two countries, by making the guinea in Ireland £1. 2s. 9d., and the half-guinea 11s. 4½d., those words could not operate in such a way as to control the legal effect of the contract; and the practice with respect to bonds entered into since that date is admitted to corroborate that view. If such would have been the effect of this contract, if it had been executed *since* 1737, when the currency of the two countries was different, *a fortiori*, ought it to be so, if executed at a period when, in the assumption of the plaintiff, the currency was the same?—[FOSTER, B. May this not be considered as a contract for the payment of money in the coin of Great Britain, although according to its currency in Ireland?—Yes. All that the lessor was entitled to get was £100 rent; and if his tenant before 1737, brought him 100 guineas, he would be entitled to get as change only £5; but when the guinea in Ireland was raised, in 1737, to £1. 2s. 9d., then the value of the 100 guineas was, in Ireland, £113. 15s.; and, consequently, the tenant whose contract was to pay £100 was, after payment of it by the 100 guineas, entitled to get change £13. 15s. In this way, the landlord got his £100 in the currency of the country where the contract was made; and if the proclamation of 1737 had lowered the value of the coin, and made the guinea only worth 20s. in Ireland, whilst it still continued to be worth 21s. in England, then the Irish landlord would have been entitled to get, in payment of his £100, one hundred guineas, because in Ireland they were worth £100 only, and not £105, as they were worth in England.—[PENNEFATHER, B. The words of the proclamation of 1737 are very different from those of the currency act. There was nothing in the former as to debts or contracts; in fact, the Crown had not the power of altering the contracts of parties.]—By the proclamation of 1737, the value of the current coin was raised, and the effect was to lower the rents, not by making any alteration in the contract of the parties, but by satisfying that contract with the payment in coin of less value than it was at the time of contract.—[CHIEF BARON. The contract, though ambulatory, and liable to be sued on wherever it is, carries with it the properties which it possesses in the country where it was made.]—The case of *Taylor v. Booth* (a) is an authority for that position. As to the effect of the late act upon this contract, the intention of the proclamation of 1737, and of the act of the 6 G. 4, was different. The object of the proclamation was to enable the debtor to discharge his debt with less gold than before; the object of the 6 G. 4, c. 79, was to assimilate the currency of the two countries, and this might

(a) 1 C. & P. 286.



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have been effected either by act of parliament or by proclamation. The legislature, in 1825, said the course taken by the proclamation of 1737 was not fair, and restored the parties to their ancient contracts. If this had been done by proclamation, inasmuch as that could not have altered the contract of the parties, or if the currency act had simply made the guinea in Ireland equal to the guinea in England, the landlord would then in effect have his rents raised, and the plaintiff here would have been bound, out of a tender of 100 guineas, to return only £5. The legislature thought that this would be a hardship. It would be clearly so with respect to contracts or leases made subsequently to 1737; and with respect to contracts or leases made antecedently to that date, it would be equally unjust to alter the relation of debtor and creditor, which had subsisted for a period of 90 years. The preamble of the act, accordingly, recites, that "it is expedient to, &c., without altering the relation of debtor and creditor." So far as the preamble of the act is concerned, it is sufficiently large to meet every case. But it has been suggested, that the enacting words of the second section are not so large as the preamble, and are to be restricted to contracts made since 1737, with reference to the currency of Ireland; that section, however, is very general; and the words entered into "at any time according to, or with reference to the currency of Ireland," are sufficiently comprehensive to include contracts made antecedently to that date; and if so, why should the court seek to restrict them? The statute is remedial, and a beneficial one in its operation. The intention of the legislature appears not only from the preamble and second section, but from every part of the act, which plainly extends to all kinds of contracts; and the court will give it the fullest operation, where a contrary course would alter the established usage of this country for centuries, and alter contracts which have been acted on differently for that period. The *Case of the Attornies & Solicitors*, before referred to, is not directly applicable to this case. It was decided on the fourth section of the late act; it was there held, that the fees of solicitors and attornies upon retainers, since the 5th of January, 1826, were within the first section of the above act, and were therefore not payable in the present currency; but, as regarded suits in progress before the act, it was conceded, that the fees, being founded on antecedent retainers, should be paid in the old currency. The contract in this lease must, upon the whole argument, be taken to have been entered into, in point of law, with reference to the currency of Ireland, and, consequently, to have been saved and provided for by the second section of the currency act. The defendant is therefore entitled to judgment on the demurrer.

Mr. *T. B. C. Smith*, Q. C. in reply.—The first question is, what is the contract of the 13th of July, 1721? There has been much miscon-

ception as to the nature of this contract. On the part of the plaintiff it is insisted, that it was a contract for the payment of £100 in English currency and English money. It is plain, from the proclamation of 1637, that sterling and English were at that time synonymous. The proclamation implies, that if sterling or English were added to any sum, the construction would follow, as of course, that this was British currency as well as British money; but the rent reserved is to be construed English and sterling, though neither word be added. At that time Irish money was a fourth part less than English; the above proclamation only restored the standard to this country, *Davis's Rep.* 57, 58, 59.

The following cases shew that an English contract could, even after 1737, have been entered into. In *Lansdowne v. Lansdowne* (a), Lord Redesdale says, "there is no lawful money of Ireland; it is merely "conventional. There is neither gold nor silver coin of legal currency; "nothing but copper." And in p. 79, "what is the difference between "lawful money of Great Britain and *sterling* money? In the statute (b) "under which the Lord Chancellor receives his salary, the amount is "fixed in English money which is called sterling:—that amount is "afterwards computed and expressed to be £10,833: 6: 8 Irish currency. There is no such thing as Irish money;—it is Irish currency." See also, the observations of Sir A. Harte, in *Pope v. Lord Ormond* (c), and those of Lord Cottenham in *Noel v. Rochfort* (d). It may be true, that *sterling* may have acquired a meaning since 1737, but what ground is there for saying, that there was Irish sterling prior to that year? the proclamation of 1637 shews that no such thing as sterling Irish then existed.—[CHIEF BARON. Your argument would go the length of shewing, that the money was payable in English currency from 1737 to 1826.]—During that interval it might have been satisfied, perhaps, in the debased currency, by virtue of the proclamation of 1737. In the *Mixed Money Case*, the proclamation was *after* the bond, which was for "£600 sterling, good and lawful money of Great Britain;" the English standard being, at the time of the date of the bond, the same as the Irish. But if the currency had been again raised by proclamation, the contract would have been again payable in British currency (e). That case, therefore, decides the legal proposition that, if a contract be entered into for the payment of a particular sum in the currency of the country where the contract is made, if that currency be afterwards depreciated, and a tender made in the reduced currency, during the period of depreciation, it must be accepted; but that is not the case here. The crown cannot vary the contract of the parties, although it may

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(a) 2 Bligh O. S. 78.

(b) 42 G. 3, c. 105, s. 1.

(c) 3 Law Rec. O. S. 88.

(d) 10 Bligh N. S. 520, 521.

(e) *Davis's Rep.* 72, 73.

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vary the liability of the debtor in respect of the sum of money he is to tender on foot of the contract. Again, if we consider the policy of the 6 G. 4, c. 79, it will be found that the object of that act was to make parties liable to pay what they contracted to pay, and not what they were liable to pay at the time of the passing of the act. The preamble states that the change in the currency is to take place "without disturbing the relation between debtor and creditor;" but a mere covenant, before the covenant is broken, is not in point of law a creditor, *Farley v. Briant* (a). If a year's rent had become due before the passing of the act, and it had been tendered in the debased currency, and the currency had afterwards risen, the creditor could not recover the increased sum; but here the rent has become due since the passing of the act. In conclusion, it is submitted that this is essentially an English contract, that in the interval between 1637 and 1826 the rent might, perhaps, have been discharged in Irish currency, but that since the passing of the currency act, it is payable in the present currency, the language of the act applying only to covenants entered into with reference to Irish currency.

*Cur. adv. vult.*

WOULFE, CHIEF BARON.—[After stating the pleadings, his Lordship proceeded as follows]:—The court have come to the unanimous opinion, that the sum tendered was equivalent to the sum due for the half year's rent, and was, in fact, the half year's rent reserved by the lease of 1721; and that the plea of tender being therefore well pleaded, the demurrer must be overruled. I am not quite sure, however, that all the court have come to that conclusion by the same process of reasoning. I shall explain the grounds of my own opinion. The present is a case of considerable importance, not so much to the parties concerned, as to the public at large, in consequence of the considerable extent of property likely to be affected by the decision of the court. The ground upon which I have formed my opinion, that the rent reserved by this indenture is now to be paid in the late currency of Ireland, or, in a sum of the present currency, equivalent thereto, is, that I think the reservation in the lease was substantially and truly a reservation of that amount of rent in Irish currency. I think it was so intended by the parties themselves; and that when they contracted in 1721, one to pay, and the other to receive this sum of £100 a year rent, they had not in view the payment of that rent in any foreign currency, or in any other currency than the current money of Ireland. Generally speaking, when parties enter into a money contract, without specifying the particular currency in which that contract is to be performed, they must be taken

(a) 3 Ad. & El. 557, and see *Wilson v. Knubley*, 7 East 128.

to mean the currency of the country wherein the contract is made. There may be circumstances to shew that the parties contracted in another currency (which of course it is competent for them to do), for instance, in dollars, moidores, or guineas, or in any other currency different from that of the country in which the contract was made; but, in the absence of such circumstances, and of any proof that they so dealt, it must be taken that they contracted in the currency of their own country, such as it was at the time the contract was made. Now, in this case, all the circumstances (notwithstanding the terms employed), appear to me, to denote that the parties contracted in *Irish* currency. The parties were domiciled in Ireland; the contract was to be performed in Ireland; and the subject matter of the contract (namely, the land out of which the rent was to grow due), was situated in Ireland. All these circumstances are indications that the contract was for Irish currency. The only circumstance which tends to shew the contrary, is the use of the words "sterling, current and lawful money of Great Britain." I admit that these words, particularly the words "lawful money of Great Britain," in their popular signification, (even in Ireland) and as used out of Ireland, would seem to import, that the rent was to be paid, not in the currency of Ireland, but in that of England. But I think the words "sterling" and "lawful money of Great Britain," as used in Irish instruments of contract, have acquired the same import as the words "lawful money" generally, or "lawful money of Ireland." There is no doubt, and it is not disputed at the bar, that these words "lawful money of Great Britain," have acquired and have had impressed upon them this signification in all Irish contracts made within the last century; our courts of justice have acted upon this understanding, and have given efficacy to bills, bonds, and warrants of attorney, in which money was described in these terms, as if they imported Irish and not English currency: they did so, deliberately and uniformly. I remember that the question was raised in the year 1823 or 1824, in the court of Common Pleas, upon a common money bond; the name of the case was *Sheehy v. Glouveny*: the whole court held, that the words "lawful money of Great Britain" had in such instruments always been considered as not importing any currency other than that of Ireland for the time being. The same court held the same in *Lansdowne v. Lansdowne*, and the subsequent decision of the House of Lords in that case did not impugn their decision so far as it gave those words that meaning. The House of Lords only decided, that in order to ascertain the real meaning of the contracting parties, it was necessary to look beyond those words into all the circumstances of the contract; the place where entered into; the residence of the parties; the place where to be performed, and the scope and bearing of other portions of the contract upon those words; and upon estimating all those *indicia* of intention, the House of Lords came to the

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conclusion, that the contracting parties in that case did mean, that Lady Lansdowne's jointure should be paid in English currency, and not in Irish; notwithstanding that the words descriptive of the currency in the contract, standing by themselves, would, in an Irish contract have meant Irish currency. The same observations apply to the case of *Noel v. Rochfort*, and to all similar cases, where the meaning of the contract is gathered from the particular circumstances which attended it. These cases rather strengthen than weaken the Irish authorities, which say that in Irish contracts, "money of Great Britain," when not controlled by external circumstances, are synonymous with "the lawful money of Ireland." It was said, however, in argument, that although these words have had the signification I give them, in instruments which were executed since 1737, yet, that in instruments which were executed before that date, they must have a different import. The reasoning on this point was this—It was argued that in 1721, by force of the proclamation of 1637, the currency of Great Britain and Ireland were one and the same, whereas by the proclamation of 1737, the currency of Ireland was reduced one-thirteenth, and therefore, (it was urged), although the words "lawful money of Great Britain" might be held to import Irish currency, in instruments made subsequently to 1737, yet, in instruments made antecedently to that date, they must be taken to import English currency. But it appears to me, that the legitimate inference from these premises is exactly the other way; and, that if the words "lawful money of Great Britain," were held to mean the currency of Ireland since 1737, when, in truth, the currency of England and of Ireland were different, *a fortiori* they may be held to mean Irish currency, when the currency of both countries was alike. From 1637 to 1737, the currency of Great Britain and of Ireland was one and the same; there was nothing very violent, therefore, at that period in describing Irish money by the words "money of Great Britain." It was after 1737, when the currency of Great Britain was no longer the same as the currency of Ireland, that violence seems to be done to language by describing "Irish money" as the "money of Great Britain." It is to the use of these latter words, in this sense, *since* 1737 and not *before*, that the great objection lies. Once admit that they bear that meaning after 1737, and there is not the slightest difficulty in giving it to them before that period. In fact, it must have been before 1737, that the words "money of Great Britain" acquired the signification they afterwards bore: they acquired that signification when it was indifferent whether it was expressed by those words, or the words "money of Ireland," and having once acquired it, they retained it. This seems to me the origin of the undoubted, universal, and recognised practice in Ireland, of reading the words "money of Great Britain," in Irish contracts, in the same signification as the words "money of Ireland." I am

therefore, of opinion, that if these words "lawful money of Great Britain" were held to signify Irish currency, in instruments made subsequently to 1737, *a fortiori* ought they to be held to denote Irish currency in instruments made antecedently to that date. If I am right then, in assuming that the parties to this instrument contracted to pay in the Irish currency, as it then was, it is a well settled principle of law, that the contract is to be fulfilled in the currency as it stands, when the contract is to be fulfilled. The *Mixed Money Case* shews this. In England, from the earliest period, the currency has undergone the greatest fluctuations in value; and yet, the uniform practice has been to pay ancient rents and moduses in the currency of the day of payment. It follows, therefore, that down to the passing of the late currency act of the 6 G. 4, c. 79, the rent in this case was to be discharged by a payment of the same number of pounds in the currency of Ireland; in other words, that at the time of the passing of that act, the tenant's liability under this lease was to a payment of £100 per annum of the then Irish currency. Indeed, that proposition seemed to be admitted in argument at the bar. It was an admission which was made of necessity, as it could not be controverted, that down to the period of the passing of the late act, all leases similarly circumstanced with the present entitled the lessors to the reduced rent only; and that rent only they uniformly have been paid. This, then, renders it necessary to consider the effect of the currency act. Upon this point I confess I feel no difficulty. I am of opinion, that the effect of the act was, in no-wise to alter the existing relation of debtor and creditor; and that parties, who were previously liable to pay a certain amount of gold and silver, continued liable, after the passing of the act, to the payment of precisely the same amount. Their liability, such as it was on the day before the passing of the act, whether it had been previously affected by fluctuations in the currency since the contract was made, or whether no such fluctuations had occurred since the contract; the terms remained, I think, unchanged by the act. It seems to me, that in the clearest terms, the preamble of the act declares such to be the intention of the legislature, and all the subsequent sections carry out that principle with the greatest care. The second section relates to contracts of the present description; and the other sections of the act are framed to meet the cases of liabilities of a public nature, not arising from mere private contracts. Every provision in the act shews, that the legislature sedulously labored to secure from the slightest variation, in point of real amount, every existing liability, public and private. If the legislature had intended to interfere with existing liabilities, it is impossible, I think, to imagine, that it would not have declared such intention, and have also explained to what extent such variation was to be carried. Upon the ground, therefore, that at the time of the passing of the 6 G. 4, c. 79, the tenant was liable to pay his rent in the re-

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duced currency only, and that it was not the intention of the act to increase his rent—I am of opinion that the demurrer ought to be overruled, and judgment given for the defendant.

PENNEFATHER, B.—This being a question of very general importance, affecting a great deal of property in this country, although I concur in the opinion of the court, it appears to me that the public ought to be put in possession of the grounds on which I concur in that opinion. I do not take exactly the same view of the subject the CHIEF BARON has done. If I did, I should have arrived much more easily at the same conclusion. I consider this to be a case of considerable difficulty; but, on the best consideration I have been able to give it, it appears to me, that the tender made by the defendant was a sufficient one, and that he is, therefore, entitled to the judgment of the court. The pleadings have been stated with great minuteness by the CHIEF BARON, and it is, consequently, unnecessary for me to make any further allusion to them. I shall, then, as briefly as I can, state the views which I entertain of this case, and the grounds upon which I rest my judgment. It is necessary to consider the state of the law with regard to the currency of Great Britain and Ireland, as it stood at different periods. I think it may be collected that, on the settlement of the English in this country, in the reign of *Henry 2*, the currency of England was established as the currency of Ireland; but, that at different periods, in consequence of the disturbed state of this country, several variations took place in the currency. Base money having gotten into circulation, the proclamation of 1637 defined what was to be the lawful currency of Ireland; and, by that proclamation, bringing back the currency to its former standard, it was declared, that “sterling lawful money of Great Britain” should be the currency of Ireland, and that contracts wherein that expression was found should be taken to intend the currency of Ireland. So matters continued until 1737; and, during the interval between that year and the year 1637 the lease which forms the subject of this action was made. It purports to be a demise of lands situated in the county of Kilkenny; the parties were all resident in Ireland; and it reserves a rent of “£100 sterling, current and lawful money of Great Britain.” That was the contract, as made in 1721. It is a contract which would have been satisfied, unquestionably, by the payment of £100 sterling, as money was then current in Ireland, because, at that period, there was no distinction between the currency of that country and of England. It must be taken as a contract to pay yearly so much lawful money of England or Ireland, by reference to the value of money as it then was. It thus appears, that the sum to be paid, from the execution of the contract to the year 1737, was money of the value of the currency of Great Britain. It remains to be considered, what was the effect of the alteration made in the

currency in the last-mentioned year, having regard to the manner in which that alteration was effected. It is to be observed, that the alteration then made in the currency was not by act of parliament, but by the prerogative of the Crown, in virtue of its inherent privilege of declaring, by its proclamation, at what amount the gold and silver coin should be current in any part of the King's dominions. Accordingly, the proclamation of 1737 declares that the guinea, or the gold coin called the guinea, should pass for £1. 2s. 9d, and the shilling for 1s. 1d., &c. In such terms was that proclamation couched. I should have had great doubts, at the time, as to the effect of that proclamation on the contracts of parties. If, as the CHIEF BARON thinks, (and I am far from saying he may not be correct in so thinking) the parties to this lease contracted for the payment of £100 in the currency of Ireland, of whatever amount that currency might be at the time the money was to be paid; then, unquestionably, the contract would have been satisfied after the year 1737, by a payment made according to the value put on the pieces of money by the proclamation of that date; for, in that case, it must be taken, that the parties contracted respectively to receive and pay £100, whatever might be the nominal value of the £1, according to the currency of Ireland. I have, however (I must confess), great difficulty in coming to the conclusion, that such was the meaning of the parties to this contract. If a bond had been executed a short time previously to 1737, in consideration of an actual payment of 100 guineas, and the obligation had been for the payment of £105 "sterling, current and lawful money of Great Britain," I think there would have been great difficulty in maintaining, that the contract was performed, and the obligation discharged, by a payment in 1738, not of 100 guineas, but of a number of guineas and shillings equivalent to £105 of the then Irish currency. There would have been great difficulty, in my opinion, in maintaining such a proposition, if an action had been commenced in an *Irish* court of justice, and still greater difficulty, if an action had been brought in an *English* court. If that difficulty would have existed in the case of a contract not connected with lands, let us see whether a contract relating to lands, and concerning the receipt of rents growing out of those lands, ought to have received a different consideration, or a different construction. If I had been living in 1738, and an action had been brought on this contract in Westminster Hall, it would have appeared to me, that the contract would not have been satisfied by the payment of any lesser sum than £100 of the *British* currency. If, therefore, I were to form my own opinion as to the construction of this contract, I rather think I should not come to the same conclusion as the LORD CHIEF BARON has arrived at. But it is probable that my

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view of the subject may be a mistaken one; I say so, not only from deference to the opinions of other members of the court, but from a consideration of the construction that for a long series of years has been given to similar contracts. It must be admitted, that in leases of this description, during the interval between 1737 and the passing of the currency act, the rent would have been considered as payable in the reduced money, or in other words, in the then Irish currency. Such a construction was either put on the original contract of the parties, in order to give effect to their intention, or else, common usage must have given an effect to the proclamation of 1737, beyond what, in point of law, it ought to have had. But, although such construction were given to instruments thus circumstanced for so many years, I should still have hesitated as to the sufficiency of that circumstance to determine my judgment on the present occasion, had I not found almost a legislative declaration that such construction was right. That legislative declaration is, I think, to be found in the third section of the currency act. The act recites, that it is expedient that a change should take place in the currency, without altering the relation of debtor and creditor; this recital, it has been properly said, may furnish a key to the act. But, it still leaves open the question as to what was the relation of debtor and creditor within the meaning of the act; whether it has reference to the time of the passing of the act, or to the making of the original contract?

The act recites the exact difference between English and Irish currency, and must, according to my apprehension, be understood (if nothing more were to be found in it), as speaking of Irish currency less by one-thirteenth than the currency of Great Britain. The second section states, &c.—[His Lordship here read the section, the substance of which is stated in the *Equity part* of this work, p. 176, *n.*]—If the case rested on this section alone, I should still feel much difficulty (and this was the only section to which the defendant's counsel drew the attention of the court), because it strikes me, that the second section, having directly noticed Irish currency as being less by 1-13th than English currency, the leases and contracts spoken of in the second section must be taken to mean those executed *with reference to such Irish currency*. Now, according to the fair construction of these words, that ought to mean such Irish currency as had already been mentioned in the previous part of the act. If, therefore, we were to rest on the second section alone, it could not be said, that this was a contract or lease made with reference to Irish currency, within the meaning of the act; inasmuch as it was a contract or lease made *not* with reference to Irish currency, less by 1-13th than British, but with reference to Irish currency of the same value as British. This (as it appears to me) would leave the matter still in great uncertainty, notwithstanding the general words of the act. And although the word *such* is not to be found expressly in the second section, yet, it is at best

doubtful whether, in fair construction, that word ought not to be implied, even though the first section professes not to alter the relation of debtor and creditor; for it could not be said to alter that relation, if this were to be construed as a contract to pay in British currency, or as the value of money was at the time the contract was made. But, whatever doubt might exist upon the first and second sections of the act, it appears to me, that the third section puts a construction on the whole, and recognizes the change which had taken place since the proclamation of 1737, in such a manner as obliges me to say, that the contract created by the lease ought to receive the construction, that at the time of the passing of the currency act, the tenant was a debtor only to the amount of the altered rent, or of the rent in the depreciated currency, and not a debtor to the amount of the rent in British currency, and if that be the case, the relation of debtor and creditor ought not to be altered by a contrary construction. The third section was made with reference to certain debts of the Crown, and also to certain rents payable to the Crown, and, amongst others, the quit rents. The quit rents originated between the year 1641, and the year 1662, or the restoration of *Charles 2*, and, consequently, were reserved at a period when the currency of Ireland, by the proclamation of 1637, had been made equal to that of Great Britain, and were payable, therefore, originally in British currency, or, at least, in a currency equal thereto. The CHIEF BARON considers them to have been payable in Irish currency, but they were expressed to be payable in "lawful money of Great Britain," and were paid in the currency of Great Britain until 1737, from which period they were paid in the reduced currency.—[His Lordship, having read the third section\* proceeded.]—The effect of this clause is, to recognise the legality of the practice which had taken place of discharging, in the reduced Irish currency, the rents payable to the Crown, which had been originally reserved in British currency. It adopts

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\* The 3d section (after reciting the 56 G. 3, c. 98, s. 26) enacts, that from and after the commencement of this act, all duties of customs, excise, taxes, stamps and postage, and all rents and revenues payable to his Majesty, his heirs and successors, and all other public dues and duties, and revenues whatever payable in Ireland, and all drawbacks, bounties or allowances, in respect of any such duties, shall cease to be estimated in Irish currency, and shall be converted into British currency, in all cases where the

same are not payable in British currency at the time of the commencement of this act; and shall be estimated, levied, collected, received, accounted for and paid by these several commissioners and officers under whose management such duties, drawbacks, bounties or allowances are collected, accounted for, and paid in British currency, so becoming the currency and lawful money of the United Kingdom, to be calculated after the rate of 12-13th parts as aforesaid, of the sums which were to have been respectively paid in Irish currency, &c.

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the reduced Irish currency as the future debt to be discharged by the debtors of the Crown, and, thereby, recognises the change which had been effected in the value of the quit rents by the proclamation of 1737. I conceive, therefore, that whatever opinions or views I might have entertained with respect to this contract, or to the usage which had prevailed in relation to contracts of a similar description, I am bound to give up those opinions and those views, in deference to the enactments of the legislature, declaring, if not expressly, yet, by the strongest implication, that the proclamation of 1737 had the efficacy of altering, or, at least of construing the original contract, in the manner in which the CHIEF BARON has construed it. Such altered state of things must, therefore, be considered as the relation of debtor and creditor. That being the case with regard to the public revenues, I think it must be taken, that all other contracts were intended to be affected in the same manner. I will not say anything more as to the meaning of the words "lawful money of Great Britain," (which, it is quite true, were, in the interval between 1737 and 1826, construed in our courts, as meaning the currency of Ireland), or how far they might be considered as affecting the question. For the reasons I have mentioned, I have come to the conclusion, that the demurrer in this case ought to be overruled.

FOSTER, B. The facts in this case may be briefly thus stated :— In 1721, a lease was made, reserving "*£100 sterling, current and lawful money of Great Britain,*" the currency in Great Britain and Ireland being then the same. In 1737 a proclamation issued, debasing the currency of Ireland, that is, declaring that every coin of gold and silver should represent 1-13th more of the currency of Ireland than it had done antecedent to that proclamation. The effect was, that immediately after this proclamation, a debt of £100 might be paid and satisfied by 12-13ths of the same weight of gold and silver that it could have been paid and satisfied by, antecedent to the proclamation. Such a proceeding, on the part of the Crown, is obviously not consistent with natural justice, and, in the present day would, I presume, not be attempted without the authority of an act of parliament. As a matter of strict law, however, I apprehend that it cannot be maintained that the Crown had no power to do so. The power to do so seems to me to be amongst those prerogatives which are laid down by books of the highest authority to be inherent in the Crown of these realms, the exercise of which, however, as a matter of prudence, in later and more enlightened times, is quite another question. We must, in the present case, and in the first instance, make up our minds as to the legality or illegality of this act of the Crown in 1737. The power of the Crown, in this respect, will be found elaborately treated in *Hale's Pleas of the Crown*, more elaborately than in any other work. In 1 *Hale P. C.* 191, it is thus laid down :—

"As to the second essential of coin, it is the *denominated and extrinsic value* which is, and of right ought to be given by the King, as his unquestionable prerogative." And, in the next page—"He may enhance the external denomination of any coin already established, by his proclamation; and thus, it hath been gradually done almost in all ages, as will appear by what follows in this chapter. This is sometimes called enhancing of coin, and sometimes enhancing it, and it is both. It is an enhancing of coin, in respect of the extrinsic value or denomination, but an imbasement in regard of the intrinsic value; as, for instance, when, in the reign of *Edward 4*, a noble was raised to a higher rate by 20d." Now, this is exactly what the proclamation of 1737 undertook and accomplished: as the noble was raised to a higher rate by 20d. in the reign of *Edward 4*, in England, so a guinea was raised to a higher rate, by 21d, in the reign of *G. 2*, in Ireland. Lord Hale goes on to consider the parallel and analogous operation of imbasement the coin, not by enhancing the denomination, but by a larger mixture of alloy; and he observes, in page 193:—"It is true, that the imbasement of money in point of alloy hath not been very usually practised in England, and it would be a dishonour to the nation if it should. Neither is it safe to be attempted without parliamentary advice; but surely, if we respect the right of the thing, it is within the King's power to do it." Again, in page 194—"All that a man can conclude upon these is, that it is neither safe nor honourable in the King to imbase his coin below sterling:—if it be at any time done, it is fit to be done by assent of Parliament: but certainly, all that it concludes is, that *feri non debuit*, but *factum valet*." Now, these last words exactly describe, I think, both the character and effect of the Irish proclamation of 1737. As to the character of the preceding, *feri non debuit*—as to its effects, *factum valet*. And, accordingly, I hold it unquestionable, that from 1737 down to the passing of the late currency act, 6 *G. 4*, c. 79, the £100 of rent which had been reserved originally in the sterling, current, and lawful money of Great Britain, which was at that time also the currency of Ireland, could be paid and satisfied, from the year 1737 until the year 1826, in the debased currency of Ireland; that is, by the payment of 12-13ths of the quantity of gold or silver which would have been required to pay and satisfy it the year after the lease was made, that is, in the year 1722, and from thence till the year 1737. If this be so, the question then becomes reduced to this—Is there any thing in the currency act of 6 *G. 4*, c. 79, which has altered the state of things which prevailed from 1737 to 1826, and which has again restored to this lease of 1721 its original efficacy of imposing upon the tenant the payment thenceforward, that is, from 1826 to the present time, of that 1-13th of gold or silver, from the payment of which he had been absolved by the proclamation of 1737, from the year 1737 to the year 1826? Now, it

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appears to me clear, first, that the currency act never intended to have any such operation. Secondly, that it has not, contrary to its intention, enacted any thing that can have that operation. It is manifest to me, from the whole frame of that act, and from the manner in which it has provided for all the several relations which it has dealt with, *seriatim*, throughout all its enactments, that it meant to change only names, but not things, and to leave all contracts exactly as it found them; and neither to improve nor disimprove the condition of any creditor, and neither to absolve nor to burden, in any degree, any debtor; nor to affect or alter, in any manner, the quantity of gold or silver which any one man had to pay to another; and, that it only provided for the calling of those quantities of gold and silver by new names. Thus the quantity of gold or silver which, before the passing of the act was called £100, was, after the passing of the act, to be called £92. 6s. 1½d. If this view be borne out, it settles the present question. Before the passing of this act, the rent in question could have been satisfied by the payment of £100 Irish currency; and, after the passing of this act, the rent would be satisfied by the payment of the same gold and silver pieces, but they would go under the new name of £92. 6s. 1½d. But the landlord, in the present case, relies upon it, that there is a virtue in the act, which entitles him to receive more gold and silver, to the extent of £7. 13s. 10½d. of the new currency, than he received before the act passed. Let us see whether the act has indeed this operation. It is a part of the recital of the act, that it is expedient that the currency of Ireland should be assimilated to the currency of England, "*without disturbing the relation between debtor and creditor.*" It is unnecessary to observe, that this relation would be completely disturbed in the present instance, if the debtor has indeed to find £7. 13s. 10½d. of the new currency, in gold or silver, more than he had to find the year preceding. But it has been sought, in argument at the bar, to meet this, by saying, that the relation between debtor and creditor, which the legislature meant not to disturb, was that which existed in 1737, namely, 89 years before the passing of the act, and that the act was indifferent as to disturbing the relation which it found established during the 89 years preceding. I cannot for a moment assign such an intention to the legislature. It appears to me to shock the common sense of mankind, to suppose that the act could have meant to refer the word "disturb," which signifies an alteration in the present state of the "object disturbed," to a thing which had ceased to exist for 89 years. But the question remains, whether the act may not, by the unskilfulness of some of its enactments, have frustrated what I think we must acknowledge to have been its professed intention. Acts of parliament sometimes have so done, but I do not think any thing of the kind has been done here. The second section of the act enacted, that all leases executed at any time before the commencement of this

act according to, or with reference to the currency of Ireland, shall, after the commencement of this act, be discharged and satisfied according to the amount thereof in such British currency, to be calculated in manner following, that is, by a sum of such currency of the United Kingdom, less by 1-13th part than the amount of such sum expressed according to the currency of Ireland. Now, this will put an end to all question in the case, if we can see our way to the conclusion, that the lease in question was, at the time of the making of the lease, executed with reference to the currency of Ireland. But was it not so? What was the currency of Ireland at the time of the execution of the lease? Why, the same as that of England; and did not the words, *£100 sterling, current and lawful money of Great Britain*, in the year 1721, refer to the currency of Ireland, exactly as much as to the currency of Great Britain? There was no distinction between those currencies at the time, and any words which referred to the one must, therefore, have referred to the other also. The words of this second section, therefore, appear to me to apply, accurately and in terms, to the existing case. And if ingenuity can suggest a doubt, as to whether currency of Ireland must not, *ex vi termini*, mean the debased currency, even before the debasement had taken place, still, at the utmost, it can only be such a doubt as the preamble may legitimately be called in to solve; and the moment the preamble is let in to aid the construction, the doubt will cease. But there is a further view of this part of the question; important to be borne on mind. It has ever been the course of decision in this country, that the words used in this lease, "sterling, current and lawful money of Great Britain," do not import, in legal parlance, British currency, as contradistinguished from Irish currency, unless there are particular circumstances in the transaction, as in the case of *Lansdowne v. Lansdowne*, to shew that the parties so intended it. If there are no such special circumstances, these words have uniformly been construed, as importing that the payment is to be made in the coin of Great Britain, but according to the currency thereof in Ireland. Coin is one thing—currency is another; and they ought not to be confounded, though they constantly are so. Currency is the computed value at which the coin is to be accepted. These words have, by a long course of decision, been taken to import, that the payment is to be made in guineas, half-guineas, half-crowns, shillings, and sixpences, coined at the tower of London; and not in doubloons, pistoles, and dollars, coined in Portugal and Spain; although all the latter have, from time to time, had occasionally a currency in Ireland, and happen to have had such at the time this lease was made, and also at the time of the proclamation in 1737, as is manifest on the face of that proclamation. These words, "current and lawful money of Great Britain," if employed after the proclamation, when there were really two currencies, would still, according to the course of decision, have been construed to

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mean only the Irish debased currency.—*A multo fortiori*, I think they must be taken to have had the same effect in 1721, when there was but one currency. But there are other enactments in the statute to which we must refer. I suggested, in the course of the argument at the bar, that the quit rents would afford a test by which this question should be tried. My invitation to that discussion was not responded to; but let us now see how the matter stands. The 3d section of the act provides expressly, that all the rents payable to his Majesty shall cease to be estimated in Irish currency, and shall be converted into British currency, to be calculated after the rate of 12-13th parts, as aforesaid. Now, observe, that these quit rents had originally been reserved, when the currencies of Great Britain and Ireland were the same, that is, before the debasement of the Irish currency had taken place. In that respect, these Irish rents are exactly analogous to the rent reserved by the lease of 1721; yet, we see the act expressly provided that they are to be paid in 12-13ths of the new currency. Now, can any one suppose that this act meant to place the ordinary landlord in a more favored situation than the Crown? Yet, that is what is contended for here by the plaintiff. The plaintiff asks here for what the act says, emphatically, the Crown shall not have, namely, payment, in the new currency, of the additional 1-13th. It may then be asked, why did not the currency act mention the ordinary landlord as well as the Crown? The reason appears to me obvious, because the legislature considered that the case of the ordinary landlord was sufficiently provided for by the second section. But the Crown could not be bound, unless specifically named; and therefore, the third section provides for the case of the Crown, and says it shall be dealt with in the same manner as had been already provided with respect to the ordinary landlord. A further light, as to the intention of the legislature, is thrown by the enactment of the 4th section,—that this act shall not be deemed to increase or decrease, or alter the quantity of gold or silver coin, in reference to any sum mentioned in any act of parliament in force at any time prior to the commencement of this act. Here, the test of not increasing or diminishing or altering the quantity of gold or silver is expressly acknowledged and set forth by the act, in reference to a variety of matters enumerated in the 4th section; and though this enumeration does not include a rent reserved by an ordinary lease, it appears to me that the reason manifestly is, that the legislature considered that the same result had been efficiently obtained, with regard to such, by the mode of computation directed in the 1st and 2d sections, and that the 4th section was necessary only for such supplemental matters as the antecedent sections had not reached, such as franchises, tolls, &c.

On the whole of this case, I see the declared mind of the legislature not to affect the validity of contracts, but only to give new names to given weights of gold and silver in Ireland, and I think that it has, efficiently and satisfactorily provided for carrying that intention into effect.

RICHARDS, B.—I concur in the judgment of the court. The subject has been so fully discussed by the several members of the court who have preceded me, that I conceive it to be unnecessary to state my views as much at length as I otherwise would have done. It is, therefore, sufficient to say, that in my opinion, the effect of the proclamation of 1737 was to enable the lessee to discharge his liability under the lease in question, by paying £100 of the currency of Ireland as established by that proclamation. I am of opinion, that, such only was his liability up to the passing of the 6 G. 4, c. 79. That act of parliament was not passed with the view or intention of changing or affecting the existing rights or liabilities of debtor and creditor, or the contracts of parties. The act in terms disclaims any such intention; and without proceeding in detail through the different sections, suffice it to say, it appears to me, that no person was bound to pay one farthing more after the act came into operation, than he was bound to pay previously. He was bound to pay just as much in the new currency as he was in the old, and no more. For these reasons, I concur in thinking, there should be judgment for the defendant, although I am far from saying it is not a subject of considerable difficulty.

Demurrer overruled.

Thursday, January 31st.

## PRACTICE—NOTICE OF BAIL

ANONYMOUS.

Objection to a notice of bail, that the bail were therein described as *householders* instead of *housekeepers* as required by the first General Rule of Hilary, 1832. In support of the objection the case of *Foudrinier v. Pike* (a) was cited.

A notice of bail in which the bail are described as *householders* is sufficient.

PENNEFATHER, B.\*—What is the difference between householder and housekeeper? I can see none, and must therefore disallow the objection.†

(a) CASES IN THE QUEEN'S BENCH, *ante* p. 2.

\* *Solus*.

† This has been held a fatal objection by the Court of Queen's Bench on several occasions; in addition to the case above cited, see *Heron v. Nugent*, 6 Law Rec. (2d series) 20, and note *ib.*; and

*Anonymous*, 1 Craw. & Dix. 83. *Sed vide* the case of *Atkinson v. Graves*, in the Court of Exchequer, Easter Term 1838, 6 Law Rec. (2d series), 211.



*Wednesday, January 23d.*PRACTICE—SECURITY FOR COSTS BY DEFENDANT IN  
EJECTMENT—INSOLVENT—ASSIGNEE.

Lessee EVANS v. REILLY.

Where an insolvent took defence to an ejectment brought by his assignee, the court refused to interfere, either by setting aside the defence, or by compelling the defendant to give security for costs, it appearing, that in consequence of his refusal to give up possession of the premises, he still continued a prisoner, and had not obtained the benefit of the act for the relief of insolvent debtors.

A defendant in ejectment will not be compelled to give security for costs, unless under very special circumstances.

Mr. BATTERSBY moved that the appearance, plea and defence, filed in this cause, in the name of the defendant, might be set aside, and that the plaintiff might be at liberty to mark judgment, notwithstanding the said appearance, plea, and defence; or, in case the court should not set aside the same unconditionally, that they might be set aside, unless the defendant should give security for costs within a week.

The ejectment was brought by the lessor of the plaintiff, as assignee of the defendant, who was an insolvent. The affidavit of the former stated, that the action was brought by the directions of the Insolvent Court, to recover possession of certain lands and premises, the property of the defendant, situated in the county of Cavan. That the defendant was a prisoner in the Marshalsea, where he had been confined from the time of his arrest, in October, 1837. That the principal and almost the only property returned in the defendant's schedule, was his interest in a lease of the lands in question; and that, in consequence of his having refused to give up possession thereof, he had not obtained the benefit of the act for the relief of insolvent debtors. The affidavit also charged, that the original arrest of the defendant had been fraudulent and collusive, and that his object in taking defence to the ejectment was to defraud his creditors, and prevent his property being made available for their benefit.

In support of the application, the cases of *Doe dem. Vaughan v. Richardson* (a), and *Doe dem. Greer v. Kelly* (b), were referred to.

Mr. James Shiel, *contra*.

*Per Curiam*.\*—As the defendant has been served with the ejectment in this case, we cannot compel him to give security for costs. This court cannot thus be rendered ancillary to the proceedings of the Insolvent Court. The defendant being in possession of a farm, becomes an insolvent, and his assignee having brought an ejectment to get possession of the farm, the insolvent chooses to take defence. That is not a

(a) 2 Huds. & Bro 117.

(b) *Id.* 118, n.; and see a case, 1 Law Rec. O. S. 57.

\* PENNEFATHER and RICHARDS, Barons.

case in which this court will interfere, or take upon itself to judge of the merits of the action. As a general rule, the court has no authority to compel a defendant in ejectment to give security for costs. We have had occasion to consider the subject more than once, and such is the opinion at which we have arrived. There may, doubtless, be very special cases, forming an exception to this rule, and in which the defendant will be compelled to give security for costs; but, in the present instance, we must refuse the application.

Motion refused, with costs.\*

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\* In the following case, which came before PENNEFATHER, B., in Chamber, on the 7th of February last, his Lordship, under the special circumstances, made an order, compelling the defendant to give security for costs:—

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*Lessee Henderson v. Haghan.*

Mr. Acheson Henderson applied, "that the defence taken by the defendant to the ejectment in this cause should be taken off the file, and that plaintiff should be at liberty to mark judgment forthwith, or that the defendant should be ordered to give security for costs and mesne rates." The application was grounded on the affidavit of the agent for the lessor of the plaintiff, which stated that David Cunningham, who held and holds a large bleach-green and premises, in all 82 acres, from the lessor of the plaintiff, under a lease, being greatly in arrear of rent, the present ejectment for non-payment of rent was brought against him, as of Michaelmas Term, 1838, and that the same was served on the said D. Cunningham and the defendant, who was a mere cottier, holding half a rood of land and a house jointly with his brother; that defence had been taken by him for all the lands and premises in the ejectment; that deponent was convinced and believed that same was taken at the instance, by the direction, and at the expense of the said D. Cunningham, in order to retain possession, and to prevent the lessor

of the plaintiff from having costs against him, and also to deter him from bringing down the record for trial against the defendant; that the defendant only came to reside on the lands since the 1st of November last, and that he works as a laborer for the said D. Cunningham, and was not, as deponent believed, worth £5; that £270 and upwards was due for rent out of said premises; that neither Cunningham nor the defendant had, as deponent believed, any just or lawful defence; that since the ejectment was brought, the said Cunningham had greatly dilapidated a mill on said premises, and that the lessor of the plaintiffs had a just, clear, and legal title and right to recover possession of said bleach-green and premises, as deponent was advised and believed.

The attorney for the plaintiff also made an affidavit, in which he stated that he had recently (since the swearing of the agent's affidavit), received a letter from him, stating that the defendant had since gone to America.

Counsel cited *Doe dem. Vaughan v. Richardson*, 2 Huds. & Bro. 117; *Doe dem. Greer v. Kelly*, id. 118, n.

PENNEFATHER, B.—Let the defendant give security for costs within one week; and in default thereof, let the defence be set aside, and the lessor of the plaintiff be at liberty to mark judgment.

☞ In addition to the cases above cited, see *Lessee Pilkington v. Scott*, 4 Law Rec. 2d Ser. 208, and *Lessee Vaughan v. Richardson*, 1 Law Rec. O. S. 356.

In ejectment for non-payment of rent, the defendant was compelled to give security for costs, where it appeared that he was a mere cottier, and that for the purpose of depriving the landlord of costs, defence had been taken in his name by the principal tenant, who had been dilapidating the premises since the ejectment was brought.

*Monday, January 14th.*

**EJECTMENT—AUTHORITY OF A RECEIVER TO SERVE  
A NOTICE TO QUIT—EVIDENCE OF APPOINTMENT  
OF RECEIVER.**

**Lessee CROSBIE v. BARRY.**

**Ejectment on the title.** The notice to quit, for the purpose of determining the tenancy, was served by the receiver appointed by the Court of Chancery in the matter of the lessor of the plaintiff (a minor).

**Held,** that an attested and compared copy of the order in the minor matter referring it to the Master to approve of a proper person to be receiver; an attested and compared copy of the report stating A. to be a proper person to be receiver; and an attested and compared copy of the order requiring the tenants to pay their rents to A., as such receiver, were sufficient evidence of the fact, that A. was the receiver in the minor matter.

**Held,** that it must be presumed that the receiver had authority to determine the tenancy by service of the notice to quit.

**Ejectment on the title.** This case, which was tried before Mr. Sergeant *Greene* at the Kerry Summer Assizes of 1838, when there was a verdict for the plaintiff, came before the court upon a bill of exceptions. The demise was in the name of the Honorable Cecilia Crosbie, the minor and ward of court, hereinafter mentioned; and it was proved that the defendant had paid rent to the lessor of the plaintiff's father whose heir the lessor of the plaintiff was. The first exception stated, that the plaintiff had offered in evidence an attested and compared copy of an order of the court of Chancery, made in the matter of Crosbie a minor, bearing date the 9th December, 1834, reciting a certain petition, and referring it to the Master to approve of a proper person to be a receiver in the matter; and, that, notwithstanding the objections of counsel for the defendant, the learned Judge allowed the order to be received in evidence. The second exception stated, that the plaintiff offered in evidence an attested and compared copy of the Master's report in the said matter, bearing date the 20th May, 1835, reciting the order of the 9th December, 1834, whereby it was referred to him to approve of a fit person to be receiver, and reporting that one Henry Oliver was a fit person to be receiver; the copy of which report, it was objected, was improperly received in evidence. The third exception stated, that an order, bearing date the 9th March, 1836, requiring the tenants to pay rent to the said Oliver, was improperly received in evidence. The fourth exception stated, that evidence of the service of a notice to quit the premises in question on the 1st of May, 1837, which notice purported to be signed by the said Oliver, was also improperly received. The fifth exception stated, that the plaintiff having closed his case, the defendant's counsel called for a direction that there was not sufficient evidence of the appointment of the receiver; which direction, the learned Judge refused to give the jury. The sixth exception stated, that the Judge also refused to direct the jury that no sufficient evidence was given to shew, that Oliver had authority to determine the tenancy. The seventh and last exception stated, that the learned Judge wrongly told the jury, that if they believed the gale days to have been the 1st of May and the 1st of November in each year, and that the defendant's tenancy commenced upon the 1st of May, they should find for the plaintiff.

**Mr. Jeffcott,** for the defendant.—We contend, that the plaintiff here *Seemle*, that such receiver was, by virtue of his office, authorised to serve the notice to quit

was bound to prove all the proceedings in the Chancery cause. The first document they proved was an order reciting a petition; but we say, they were bound, first, to have given in evidence the original petition; even where there is a decree in a cause, it is necessary to give the bill and answer in evidence.—[PENNEFATHER, B. You are quite right as to the law of evidence before the decree is made up, but, if it be made up, it is not necessary to give the bill and answer in evidence; here, the order is in the nature of a decree made up, and embodies the petition. If a receiver were appointed by an adult, he would be appointed by deed, and the deed would be the evidence of his appointment; and this plaintiff here, being a minor, the order, which in effect appoints the receiver, is the best evidence of his appointment.]—[RICHARDS, B. The order is the record.]—The next question of importance is, whether or not a receiver under the Court of Chancery has power to determine a tenancy by serving a notice to quit? The case of *Wilkinson v. Colly (a)* does not rule this case; for the decision there was under a remedial statute; and in *Lake v. Smith (b)*, which was an action on the same statute, Chambre, J. says, that the case of *Wilkinson v. Colly* was a strong decision in the landlord's favor.—[PENNEFATHER, B. This is not the case of a receiver appointed in a cause, but, of a receiver appointed in a minor matter, and the question is, whether he is not to be considered as an ordinary or private agent? The Court of Chancery, as the protector of minors, appoints a receiver, who is accountable to that court for the management of the estate; if he acts improperly, he is responsible to the Court, and a complaint may be made against him either by the minor or the tenant.]—The receiver is appointed to collect the rents only. His recognizance has reference to that alone. He has no power to determine a tenancy, although, perhaps, the court may. [WOLFE, C. B. Your argument is, that the Court of Chancery might authorise the receiver to serve the notice, but, that such an authority ought to be shewn. I think, we must take it, that the receiver did not act without authority. You made no complaint to the court.]—Although we made no complaint in Chancery, nevertheless, we have power now in a Court of Law to insist on the invalidity of the notice. A mere receiver of rents has no authority to determine a tenancy, *Doe d. Mann v. Walters (c)*, and a receiver appointed by the Court of Chancery is a mere receiver of rents, and has no power to serve a notice to quit, or to bring an ejectment, *Adams on Ejectments*, 126. We further say, that in this case, the learned Judge directed the jury to find for the plaintiff, without leaving to them any question at all on the evidence.

Mr. Henn, Q. C., and Mr. Hickson, Q. C., for the plaintiff.—The

(a) 5 Burr. 2695.

(b) 1 B. & P. 174.

(c) 10 B. & Cr. 629.

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argument on the other side is grounded on a supposed difference between the authority of a receiver under the Court of Chancery in England, and of a receiver under the Court of Chancery here. A receiver, under the court in England, always had the power of managing the estate, but here, he formerly had no such power without the special permission of the court; however, the new orders of the Court of Chancery, made in pursuance of the 4 & 5 W. 4. c. 78, have, in this respect, placed the receiver in Ireland upon a footing similar to that of the English receiver, for by the 185th order of 1834, a receiver in Chancery is authorised, with the approbation of the Master, but, without any order of the court, to let, and generally manage the lands over which he is receiver. [PENNEFATHER, B. It would appear from the exceptions, that the Judge had taken on himself to decide as to the authority of the receiver, and that the question he left to the jury was, the determination of the tenancy.]—In *Wilkinson v. Colly*, there was no regular notice to quit. In *Doe d. Marsack v. Read (a)*, it was decided, that a receiver appointed by the Court of Chancery, with a general authority to let lands, had also authority to determine such tenancies by a notice to quit. That case is precisely in point.

The order for the appointment of the receiver in this case was sufficient evidence of his appointment. The argument at the trial was, that the Court of Chancery had no power to appoint a receiver, unless upon bill filed; but the statute 4 & 5 W. 4, c. 78, s. 7, gives the court a power to appoint a receiver of the real and personal estate of minors, on petition.—[PENNEFATHER, B. The Court of Chancery always had power to appoint a receiver on petition.]—The Judge below had a right to decide himself upon the authority of a receiver under the court, and the material question is, whether or not the receiver had authority to determine the tenancy? It would have been wrong also for the Judge to have told the jury there was no evidence of the receiver's authority. For we proved the order appointing the receiver, the service of the notice to quit by him, and the payment of rent by the defendant to the minor's father. The Chancellor has a right to manage the estate in the same manner as the infant himself might do if he were under no disability; and the act of the receiver here was, in effect, the act of the Chancellor. An agent may give notice to quit, without an express authority to do so, *Roe d. Dean, &c. of Rochester v. Pierce (b)*.—[RICHARDS, B. If the tenant were to serve notice of surrender on the receiver, it would be hard to say that such surrender would not be sufficient.]

Mr. Bennett, Q. C., in reply.—The principal question here is, whether or not the tenancy has been put an end to by this notice to quit.

(a) 12 East, 57.

(b) 2 Camp. 96.

We say that it has not been determined, first, because there is no sufficient evidence of the appointment of this receiver ; and secondly, because the notice to quit served by this receiver was not a sufficient notice to determine the defendant's tenancy. The order given in evidence recited a petition presented for a receiver, which petition is not proved ; and then the plaintiff handed in the report of the Master, whereby he approved of Henry Oliver as such receiver : but no order appointing the receiver has been proved. Then the notice is defective ; it is entitled in the minor matter, and is in the name of the receiver, who has no legal estate in him. The cases in England were decided on the ground that a receiver under the Court of Chancery there had a power to let ; and so are not applicable to cases in this country. In *Doe d. Marsack v. Reed*, the receiver had a general authority to let ; and, in that case, a demise was laid in the name of the receiver. The case of *Doe d. Marsack v. Walters* decides, that a general agent has no power to determine a tenancy. Under the new rules, the receiver must have the approbation of the Master before he serves notice to quit ; but, in this case, there is no evidence that any such approbation was given.—[PENNEFATHER, B. We ought to presume that a public officer did not act without authority.]—The question is, had this receiver authority to determine the tenancy or not ? We say he proved no such authority in him.—[WOULFE, C. B. Would the minor be bound by the notice ?]—Certainly not, for the receiver had no authority to serve it. I admit that the Chancellor may be considered as standing in the place of the minor, and that he might order a notice to quit to be served, and perhaps the Master, who is an officer of the Chancellor, might do so ; but a mere receiver has no such authority. At all events, the notice should have required the possession to be delivered to the minor.

WOULFE, C. B.—We think that, in this case, we are bound to presume the receiver had authority to serve the notice to quit ; and the jury having found for the plaintiff on the question, which we think was properly left to them by the Judge, the verdict must stand.

Exceptions overruled.

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CROSBIE  
v.  
BARRY.

*Tuesday, January 15th.*

## PRACTICE—AFFIDAVIT—REFERENCE FOR PROLIXITY.

KAVENAGH v. SEXTON.

An affidavit cannot be referred for prolixity on the law side of the Exchequer, without an order of the Court, obtained on motion.

Mr. ROLLESTON applied for liberty to refer an affidavit made in this cause for prolixity.\* Counsel stated, that it was necessary to have the leave of the court to refer an affidavit for prolixity on the Law side, although, on the Equity side, such reference was made on a side-bar rule. Motion granted.

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\* Affidavits on the Law side of but such reference is now always this court, were formerly referred made to the Clerk of the Pleas. for prolixity to one of the Barons;

*Monday, January 21st.*

## BOND—WARRANT OF ATTORNEY—38TH NEW GENERAL RULE.

DOBSON and LOVE v. M'DAID.

Judgment was entered up against the defendant on a bond, by virtue of a warrant of attorney, which bond and warrant were executed by the defendant to the plaintiffs, whilst the former was in custody on mesne process, at the suit of the latter, and without the presence of an attorney. The defendant

Mr. CHAMBERS had obtained, in the last Term, a conditional order, that the judgment in this cause should be set aside, same having been entered on a bond, under a warrant of attorney, which bond and warrant were executed by the defendant whilst in custody, no attorney being then present. The affidavit on which the conditional order was granted, stated, that at the time the bond and warrant were executed by the defendant, he was in custody on mesne process; and, on this day,

Mr. Chambers applied to have the conditional order made absolute. The 38th General Rule, of Easter Term, 1834, is express on this point. "No warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff or other officer on mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney

having been subsequently arrested on foot of the judgment, took the benefit of the insolvent acts, and returned the judgment in his schedule. Held, that by returning the judgment in his schedule, the defendant waived the irregularity, viz. the execution of the warrant of attorney without the presence of an attorney on his behalf.

"shall subscribe his name as a witness to the due execution thereof, "and declare himself to be attorney for the defendant, and state that "he subscribed as such attorney." There is a similar rule in England; 2 *Str.* 903; *Cowp.* 281. The case of *Valentine v. Gulland* (a) is an authority to shew, that the provisions of the rule cannot be dispensed with.

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DOBSON  
and  
LOVE  
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*Mr. James Sheil, contra.*—The affidavit of the plaintiff states, that in May, 1837, the defendant, being in custody on mesne process, at the plaintiffs' suit, sent a message, requesting their attendance at the gaol, where he was confined, and then and there proposed to give his bond and warrant for the debt which he owed to the plaintiffs; that such proposal was accepted, and thereupon the bond and warrant of attorney in question were executed; that in March, 1838, the defendant was arrested on this judgment; that in June, 1838, he took the benefit of the insolvent acts, and obtained his discharge; and that he returned the judgment in question in his schedule.—[PENNEFATHER, B. He made it the foundation of a judicial proceeding.]—And having done so, he remained quiescent until November, 1838, when he applied for, and obtained the conditional order. The 24th rule of Easter Term, 1834, declares, that "No application to set aside process or proceedings for "irregularity shall be allowed, unless made within a reasonable time, "nor if the party applying has taken a fresh step after knowledge of the "irregularity." We rely on this rule, and the case of *Gillman v. Hill* (b), as cause against making this order absolute.

*Mr. Chambers in reply.*—It is admitted, that the defendant executed the bond and warrant without the presence of an attorney on his behalf, and the terms of the 38th rule are clear and decisive. With respect to the return of the judgment in the defendant's schedule, he was, in March 1838, taken in execution on the judgment, nominally at the suit of the plaintiffs, but really at that of a Mr. Wood, who had obtained an assignment of the judgment, though his assignment was not recorded, and in his schedule, the defendant returned the judgment debt as disputed.

*WOLFE, C. B.*—What a field of litigation would be here opened, if we were now to go into all the Insolvent proceedings? The defendant, by acting on this judgment, as he has done, must be considered as having waived the rule.

*PENNEFATHER, B.*—After the defendant had been at large for a year,

(a) 2 Taunt. 49. (b) Cowp. 141; vide *Wright v. Luttrell*, 1 Craw. & Dix. 163.



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DOBSON  
and  
LOVE  
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he is arrested on this judgment; he then makes it the ground of a judicial proceeding, to procure his discharge as an insolvent, from this as well as from his other debts; and having thus acted on the judgment as a valid one, and relied upon it, as giving the Insolvent Court jurisdiction, he now wants to treat it as a nullity; but this, in the opinion of the court, he is estopped from doing.

RICHARDS, B.—By making this order absolute, we would allow the defendant to play fast and loose, to serve his purpose: he first treats it as a subsisting judgment, and now, he wishes to be permitted to say it is null and void.

Cause allowed with costs.

Thursday, January 31st.

### PRACTICE—RULE FOR OYER.

FITZPATRICK v. FLEMING.

The rule for oyer does not stop the entering of the rule for judgment although it stops the entering of the judgment itself.

Mr. LEECH, for the defendant, applied that the rule for judgment of the 29th day of January instant, which had been entered by the plaintiff, should be vacated. The plaintiff in his declaration in this case had made profert of letters of administration to one Patrick Fitzpatrick, deceased. On the 28th of January, the defendant entered and served the rule for oyer, which was in the usual form.—“Plaintiff to stop until he gives oyer of the letters testamentary in the declaration mentioned.” The plaintiff has not yet given oyer, but the 29th of January, he entered and served the rule for judgment, under which he will be entitled to mark judgment on the 2d of February.

PENNEFATHER, B.—The course is this; the rule for oyer does not stop the entering of the rule for judgment, but stops the entering of the judgment itself.

No rule.\*

\* If the rule for oyer were to have the effect of preventing the entry of the rule for judgment, it might in many instances be productive of inconvenience, if not of injustice to the plaintiff, inasmuch as a defendant, whose object was delay, might, by entering the rule for oyer on the last day upon which the plaintiff could enter his rule for judgment, throw the latter out of a trial at the next Assizes;

whereas, the practice of allowing the rule to stop the marking of the judgment merely, prevents it operating injuriously to the plaintiff, while it does not in any way prejudice the defendant, who has, in every instance, twenty-four hours to plead after oyer furnished, although, by the previous entry of the rule for judgment, the time for pleading may have expired.

Monday, February 4th.

IN CHAMBER.

Coram PENNEFATHER, B.

PRACTICE—DECLARING AGAINST PRISONER.

O'DONNELL v. SWEENEY.

Mr. ECCLES applied, that the defendant in this cause might be discharged from the custody of the sheriff of the county of Roscommon, the plaintiff not having declared against him within the term following the return of the writ upon which he had been arrested.

The defendant had been arrested under a *cap. quo. min.* in September, 1838. The writ was returnable on the first day of Michaelmas Term following, but no declaration had been filed by the plaintiff against him during that or the succeeding Hilary Term.

Mr. Eccles.—The defendant clearly comes within the provisions of the 8 Anne, c. 9, *Ir.* (similar to the 4 & 5 Wm. & M. c. 21, *Eng.*) The preamble of that act recites, that plaintiffs are at great charges in arresting defendants, and that unless the plaintiffs shall, before the end of two terms next after such arrest, cause the defendants to be removed by *habeas corpus*, to be charged with a declaration or declarations, such defendants are discharged out of custody on common bail. It is then enacted, that if at any time any defendant shall be charged in custody, at the suit of any person, upon any writ out of the courts of Dublin, and be detained in prison for want of sureties, “the plaintiff or plaintiffs in such writ “or writs shall and may, before the end of the next term after such writ “or process shall be returnable, declare against such prisoner,” &c. It then enacts, that a true copy of the declaration be delivered to the prisoner or gaoler, to which the prisoner shall appear and plead; and if the prisoner does not plead to the declaration before the end of the term next after such declaration shall be delivered, in such case the plaintiff shall have judgment. The object of the act was to abolish the necessity of removing a defendant in custody of a sheriff to the custody of the marshal, for the purpose of being declared against, and it points out the time for declaring, and the mode of service.—[PENNEFATHER, B. There is no express rule of court limiting the time for declaring against a prisoner, under such circumstances. The 45th General Rule applies only to the time of charging a defendant in execution, or of proceeding to judgment after declaration.]—From the time of the passing of the 4 and 5 W. & M. c. 21 *Eng.*, the invariable construction put upon that act in England has been, to grant a *supersedeas* to the writ, where the plaintiff has not declared against a prisoner within the term following the return of the writ, *Holland v. Sargent* (a); *Dent v. Hallifax* (b); *Blythe*

Although a defendant has been in the custody of the sheriff, on mesne process for two terms, without any declaration having been filed against him, he is not entitled, under the 8 Anne, c. 9, *Ir.* to his discharge from custody. The defendant according to the practice in this country, may, at any time within two terms after his arrest, put the usual two-day rule on the plaintiff to declare against him. But if he suffers two terms to pass without serving such rule, he must have himself removed by *habeas corpus* into the custody of the marshal, before he can rule the plaintiff to declare.

Note—A different practice prevails in England.

(a) 1 Salk. 99.

(b) 1 Taunt. 493.

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 O'DONNELL  
 v.  
 SWEENEY.

*v. Harrison (a).* The defendant cannot now be declared against under this act; before the act, no prisoner could be declared against until removed from the custody of the sheriff to that of the marshal; and it is now too late to remove the defendant by *habeas corpus*. How could the plaintiff here obtain a good judgment against this defendant? The act says, if the plaintiff shall declare within a certain time, and serve the declaration in a certain manner, *then* the prisoner shall plead thereto, and if he does not plead within a certain time, the plaintiff shall have judgment. The prisoner would not, under this act, be obliged to plead to a declaration now served, nor would a judgment entered for want of such plea now be regular. The only Irish cases are *Carroll v. Rogers (b)*, and *Jebb v. Blake (c)*. In these cases, the applications for the prisoner's discharge under the 8 Anne, c. 9, were refused, because the applications were made when the prisoner was in the custody of the marshal, the court being of opinion, that the statute applied to those cases only where the defendants were in the custody of the sheriff. These cases are, therefore, authorities in favor of this application.

*Mr. O'Dowd, contra.*—The practice in England is, as stated on the other side, but a totally different practice prevails in this country, *Stewart's Practice*, 492, where several cases are referred to. The effect of the statute, 8 Anne, c. 9, was to enable a plaintiff to file a declaration against a prisoner in the custody of the sheriff, without removing him by *habeas corpus* into the custody of the marshal, as he was obliged to do by common law. In England, at the end of the term after the writ is returnable the defendant is entitled to his discharge, if no declaration has been filed. But, in this country, the defendant may, at any time after his arrest, rule the plaintiff to declare in two days, and in default of his doing so, apply to the court for a *supersedeas*. The defendant here is now circumstanced as if the statute of Anne had never passed, the time mentioned therein having gone by. He must, therefore, if he wishes to obtain his discharge, remove himself by *habeas corpus* into the custody of the marshal, and then he can rule the plaintiff to declare, *Chapman v. Gosson (d)*, and such is stated to be the practice, in the notes to *Carroll v. Rogers (e)*.

PENNEFATHER, B.—The practice in England and Ireland is very different. In England, the defendant would be entitled to his discharge; but in this country he is not. The practice is laid down correctly in the case cited from *Alcock and Napier*. However, as there was a fair ground for arguing this case, from the English practice and authorities, I will not give costs. Motion refused without costs.

(a) 1 B. & P. 535.

(b) Batty 304.

(c) 1 Huds. & Bro. 410.

(d) Alc. & Nap. 174.

(e) Batty 319.

# CASES

## IN THE COURTS OF

### QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER,

#### IN EASTER TERM, 1839.

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### QUEEN'S BENCH.

*Monday, April 15th, 1839.*

#### PRACTICE—WRIT—PRISONER—HABEAS CORPUS.

ANONYMOUS.

Mr. NAPIER applied for the direction of the court to the governor of the gaol of Carrickfergus, in the county of Antrim, with respect to a prisoner brought up on a writ of *Habeas Corpus* issued out of this court. It appeared by the sheriff's return indorsed upon the *Habeas Corpus*, that the prisoner was arrested on the 11th of February last, upon a writ of *Capias*, on *mesne* process out of the Court of Common Pleas, marked for a sum of £336, and on the 6th of April following, a writ of detainer was also issued against him out of this court, marked for a sum of £23. The prisoner, on the application for the writ of *Habeas Corpus*, did not disclose the fact of his having been arrested upon the writ out of the Court of Common Pleas. The governor of the gaol had brought him up in obedience to the writ of *Habeas Corpus*, which required him to be brought up immediately on delivering the writ, and he had been in custody for several days in Dublin, at great inconvenience. An application had been made to a Judge of the Common Pleas, for a committal upon the writ of that court, but he refused to interfere; and if the prisoner should only be committed under the writ out of this court, then, upon a collusive settlement, or upon the payment of the smaller debt, he would be discharged, and the sheriff would be liable to an

Where a party having been arrested on a marked writ for £336, issued out of the Court of Common Pleas, and a writ of detainer having been afterwards issued against him out of the Queen's Bench marked for a sum of £23, a writ of *Habeas Corpus* issued out of the Queen's Bench to remove him from the gaol of Carrickfergus, where he was in custody, and it appeared that the fact of the prisoner having been arrested upon the writ out of the

Common Pleas, was not disclosed upon the occasion of obtaining the writ of *Habeas Corpus*; the court ordered the prisoner to be committed to the custody of the marshal, under both writs, in order to prevent his discharge, without an order from each court.

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ANONYMOUS

action for an escape, at the suit of the party who had arrested the prisoner, by writ from the Common Pleas. Mr. *Napier* suggested the propriety of quashing the writ of *Habeas Corpus*, as having issued impropvidently, in consequence of the suppression which he had mentioned, and which seemed the result of collusion between the prisoner and the party who had detained him. However, as the question was one of some consequence to the sheriff, who was the really responsible person, and was also not unlikely to be of general importance, he thought it right to state to the court, that he had found an authority which suggested a course which was somewhat more formal, though more circuitous, and which was suggested in *Com. Dig. Habeas Corpus*, L. 1, namely, that of committing the prisoner under *both* writs; and then the plaintiff, in the Common Pleas, might apply for a *Habeas Corpus*, directed to the marshal, and have the prisoner remanded to his former custody, if necessary, by the Court of Common Pleas.

The COURT—After consulting with the officers, and deliberating for some time—directed that the prisoner should be committed under *both* writs, so that he could not be discharged without an order from each Court. (a).

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(a) The object of changing the custody is to take the benefit of the insolvent act in Dublin—subject the debtor to a more convenient opposition from his creditors there. which if done in the country might

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*Monday, April 22d.*

PRACTICE—AFFIDAVIT TO HOLD TO BAIL—  
PROMISSORY NOTE.

CHAFFERS v. BINGHAM.

An affidavit to hold to bail, giving only the initials of defendant's christian name, and stating he was indebted to plaintiff as indorsee of a promissory

The affidavit in this case stated that H. Bingham, the defendant, was indebted to the plaintiff as indorsee of a promissory note, bearing date, &c., and drawn by the said defendant, payable to the order of one Francis Burghart, for the sum of £203, three months after date, and indorsed to the plaintiff. It then stated that the bill was due, presentment, and no tender to pay the amount, and that the said sum and every part thereof was due to the plaintiff by the defendant. It ap-

note, drawn by the defendant, payable to a third person, and indorsed to the plaintiff, Held insufficient, in not giving the christian name in full, and also, in not shewing by whom the bill was indorsed to the plaintiff.

peared that the affidavit was sworn in England. The defendant, on a former day, obtained a rule for the plaintiff to shew cause of bail.

Mr. *Edward Wright* now shewed cause by reading the affidavit.

Mr. *Henry Martley* objected to the affidavit as defective, on two grounds; first, in only giving the initial letter of the defendant's christian name; and secondly, as not shewing by whom the bill was indorsed to the plaintiff. The 3 & 4 W. 4, c. 42. s. 12, which enables a party suing on a bill, in which the initial letter of the christian name only is given, to sue the defendant by the same description, does not extend to this country; and before that act was passed, an affidavit like the present was held bad in England, *Reynolds v. Hankin (a)*. And even in such an affidavit under that act, it ought to appear, that the defendant was so described in the instrument upon which he was sued. The affidavit here must be conformable to the General Rule, which, in this case it clearly is not, in omitting altogether the christian name of the defendant. As to the second objection there are several authorities to prove, that it is not sufficient for the plaintiff to state that he sues as indorsee, but, it must distinctly appear by whom the bill or note was indorsed to the plaintiff, *M' Taggart v. Ellice (b)*; *Lewis v. Gompertz (c)*; *Woolley v. Escudier (d)*. And so laid down in *Chitty's Archbold's Practice*, 87.

Mr. *Wright* replied.—This case is not within the General Rule, because the defendant has given forth his name as in the affidavit, and the affidavit was sworn in England, and therefore, this defect is cured by the statute. In *Elstone v. Mortlake (e)*, an affidavit stating that the defendant was indebted to the plaintiff upon a bill of exchange, payable to a third person, at a day now passed, was held sufficient, without shewing the connection between the payee and the plaintiff; and in *Bradshaw v. Saddington (f)*, an affidavit not more precise than the present was held sufficient.

CRAMPTON, J.—These cases only shew, that it is not necessary to state the character in which the plaintiff sues, but they do not decide, that if he state the character in which he sues, he must not shew through whom he derives that character. I must follow the authorities which have been cited, and which are against you on both objections.

Rule absolute.\*

(a) 4 B & Al. 536.

(b) 4 Bing 114; 81 C. 12 Moo. 326.

(c) 2 Cro. & J. 652

(d) 2 Moo. & S. 392.

(e) 1 Chy. Rep. 618.

(f) 7 East. 94; S.C. 3 Smith 117.

\* The authorities upon the second objection to this affidavit are very conflicting in both countries, and the practice does not ap-

1839.

CHAFFERS  
v.  
BINGHAM.

*Monday, April 22d.*

**PRACTICE—JUDGMENT—FORGED BOND AND  
WARRANT.**

**CONNORS v. CONNOLLY.**

Where a conditional order was obtained to set aside a judgment entered upon a bond and warrant, on the ground that they were forged, and on motion to make the order absolute, the court being unable to decide upon the conflicting statements in

the affidavit directed the plaintiff to declare on the bond at the ensuing assizes, which he neglected to do, the order was made absolute, upon a motion grounded on these facts.

Mr. COPPINGER applied, in this case, to make the conditional order absolute. It appeared that in last term a conditional order had been obtained to set aside a judgment, which had been entered upon a bond and warrant of attorney, on the ground of fraud and forgery. That the present motion was made in a subsequent part of the term, and the affidavits being conflicting as to the facts, the court ordered the motion to stand, and that the plaintiff should declare on the bond, and have the case tried at the ensuing Cork assizes; that the defendant had called upon the plaintiff to do so, by notice, and notwithstanding that, he had allowed the assizes to pass over without a trial. There were several suspicious circumstances in the case; amongst others, the paper on which the bond

pear to be well settled in any of the courts. It may be useful therefore, to collect the reported decisions upon this subject. In *Bradshaw v. Saddington*, 7 East. 94, it was objected, that it did not appear from the affidavit, whether the plaintiff was payee or indorsee of the bill on which he sued, and it was decided, that it was not necessary that the plaintiff should shew the character in which he sued. The authority of this case is affirmed in *Elstone v. Mortlake*, 2 Chy. R. 648; *Warsmley v. Macey*, 5 B. Moo. 52; S. C. 2, Bro. & B. 338; *Bennett v. Dawson*, 1 Moo. & P. 594, S. C. 4 Bing. 639, in which case Best, C. J. said "the numerous cases upon this point are of a most conflicting nature, and we must therefore have recourse to common sense. The true principle was laid down in *Bradshaw v. Saddington*, viz., that if the plaintiff had "no interest in the bill, on which

"he could sue the defendant, he "would be guilty of perjury:" and in *Hughes v. Brett*, 3 Moo. & P. 566, S. C. 6 Bing. 239, the court said, it would be governed by the case of *Bennett v. Dawson*. Similar affidavits were held sufficient in *Lamb v. Newcombe*, 15 B. Moo. 14, S. C. 2 Bro. & B. 343, and in *Mammatt v. Matthew*, 10 Bing., 500. which is the latest reported authority on the subject.

In *Balbi v. Batley*, 6 Taun. 25, the affidavit stated that the defendant was indebted to the plaintiff on certain promissory notes, but did not say they were given or payable, or indorsed to plaintiff, it was held insufficient; but in *Machu v. Fraser*, 7 Taun. 171, S. C. 2 Marsh. 483, Gibbs, C.J. said, "I shall only observe, with "respect to the case of *Balbi v. Batley*, that we thought we were "acting then consonantly to the "established practice. That, however, appears from the case of

and warrant was executed appeared, from the water-mark, to have been made several years after the date at which the bond and warrant purported to have been executed. The present application was upon notice.

The Court granted the application.

Motion granted.

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CONNORS  
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"*Bradshaw v. Saddington*, which "was not cited in *Balbi v. Batley*, "and which very much breaks in "upon the latter case, to have been "otherwise." In *Humphries v. Winslow*, 6 Taun. 531; S. C. 2 Marsh, 231, the affidavit was held defective, for not shewing the relation in which the defendant stood to the bill. The cases of *M<sup>c</sup>Taggart v. Ellis*, 12 B. Moo. 326; S. C. 4 Bing. 114, and *Lewis v. Gompertz*, 2 Cro. & J. 352, 1 D. P. C. 319, are frequently cited, as they have been in the above case, in cases where the character in which the defendant stands in relation to the bill is shewn, to shew that the character in which the plaintiff sues must be shewn also; but it should be observed, that in neither of these cases did it appear in which character the defendant was sued; and in many of the cases already cited, the distinction as to the plaintiff and the defendant in this respect has been considered; and while it was said that it was not necessary that the plaintiff should shew the character in which he sued, it was considered essential that he should shew the character in which the defendant was sued. In *Woolley v. Escudier*, 2 Moo. & S. 392, the affidavit stated that the plaintiff sued as indorsee of a bill accepted by the defendant, and duly indorsed, and it was held insufficient

for not shewing by whom it was indorsed. The case of *Bradshaw v. Saddington* was not cited in any of these cases. It would seem, from these cases, that the weight of authority is in support of requiring the defendant's relation to the bill to be shewn, and that it is not necessary to shew the character in which the plaintiff sues; and that also, perhaps, if you state that the plaintiff sues as indorsee, it should be shewn by whom the bill was indorsed to the plaintiff. In *Stewart's Practice*, 267, it is said, "An affidavit to "hold to bail on a bill of exchange, "must shew the character in which "the defendant is sued;" and, page 273, "it is not necessary to shew "in what character the plaintiff "sues. And in *Croslet v. Browne*, in the Queen's Bench, 1 Law Rec. 453, an affidavit was held defective for not shewing the relation in which the defendant stood to the bill. In *Liddy v. Monahan*, 2 Law Rec. N. S. 155, in the Exchequer, the affidavit was held defective, in not shewing the character in which the plaintiff sued. In *Tuthill v. Bridgeman*, ante, 62, in the same court, the same objection was allowed; and in *M<sup>c</sup>Carthy v. Birney*, ante, 39, in the Queen's Bench, the affidavit was held insufficient, one of the objections being, that the plaintiff's relation to the bill was not shewn.



*Tuesday, April 23d.*

PLEADING—CONSIDERATION—COLLATERAL PROMISE.

BLAKENEY v. WARE.\*

Where the declaration in one count stated that certain actions had been commenced by one B. as trustee of the plaintiff, against C. & J. for certain sums (specified) due by them to B., as such trustee for the plaintiff, that judgment was recovered against them, and said C. & S. taken in execution; that in consideration thereof, and that the plaintiff at the request of the defendant, would consent to the discharge of the said C. & S. out of custody on their paying the sums respectively due by them, and half the costs, the defendant undertook to pay the plaintiff the other half of costs inserted

**ASSUMPSIT.**—The first count of the declaration stated, that certain actions had been commenced and prosecuted by one Robert Blakeney, *as trustee for the plaintiff*, against William Callaghan and John Sheehan, for the recovery of £10. 7s. 7d., and £13. 5s. 7d., due by them to the said R. Blakeney as such trustee for the plaintiff; that judgments were recovered in these actions, and the said Callaghan and Sheehan taken in execution, and detained in custody; and in consideration of the premises, and that the plaintiff, at the request of the defendant, would consent to the discharge of the said Callaghan and Sheehan out of custody, on their paying the sums respectively due by them and half the costs; the defendant undertook and promised the plaintiff to pay him the other half of the costs inserted in the executions against said Callaghan and Sheehan; it then averred the consent of the plaintiff to their discharge on paying the amount of the said sums respectively, and half the costs; that the other half of the said costs amounted to £11. 16s. 7d., which was to be paid by the defendant on request, and then the breach that he did not pay, &c. The second count varied from the first, in stating merely the recovery of the judgments against Callaghan and Sheehan, and their arrest, and that in consideration thereof, and plaintiff's consenting, that the defendant promised to pay half the costs of the action for which they were taken in execution, and that the plaintiff consented to their discharge. The third count stated, that in consideration that the plaintiff would consent to permit the sheriff to discharge them, that the

\* This case was argued in last *Trinity* and *Hilary* Terms. The second count in the declaration contained a number of clerical

errors, in addition to the defect stated in the report, and was at once given up by the plaintiff's counsel.

in the said executions; it then averred the consent of the plaintiff to their discharge on paying the amount of said sums and half the costs; that the other half of said costs was to be paid by the defendant on request, and then stated the breach: and another count which differed in stating that the defendant promised to be answerable to the plaintiff for half the costs, in consideration that the plaintiff would consent to permit the sheriff to discharge the debtors; that he did consent, and that the sheriff did discharge them; *Held*, on demurrer—that both counts were bad for want of an averment, that these costs remained due and unpaid, the defendant not being primarily liable; *Held also*, that the consent stated in the first count should be a consent from the plaintiff in the execution, and that it should be averred that such consent continued to the bringing of the action. A third count stated, that defendant promised to pay half the costs, without stating to whom. *Held* bad for want of such an averment.

The statement, that one person is trustee for another, is not sufficient, the nature of the trust should be shewn. *Burton, J.*

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defendant undertook and faithfully promised to be answerable to the plaintiff for half the costs; that he did consent, and that the sheriff did discharge the debtors, &c. Demurrer to these three counts and three special causes assigned, two of them applying to all the counts, viz., *First*, that there was no sufficient consideration, and that the supposed consideration was insufficiently set forth; *Secondly*, that the promise was in the nature of a guarantee, and no default shewn in the persons primarily liable. The *Third* cause of demurrer was assigned only to the second count, viz., that no promise to the plaintiff was alleged therein.—Joinder in demurrer.

Mr. *Leslie*, with whom was Mr. *Dobbs*, in support of the demurrer.—As to the first ground of demurrer, the general principle, as to what is sufficient to constitute a consideration in assumpsit, may be taken as laid down in the judgment of Yates, J. in *Pillans v. Van Mierop* (a); and adopted in the note 2, to *Forth v. Stanton* (b), viz., “that any damage or any suspension or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration, and will make it binding, although no actual benefit accrues to the party undertaking.” The meaning of this definition of consideration founded on detriment is, that the court must be able to see, from the facts alleged upon the pleadings, and from those facts alone, that detriment must, or in some events may result, as the consequence by the connection between cause and effect. Speaking of this definition of Yates, J. in *Jones v. Ashbournham* (c). *Le Blanc, J.*, says, “I do not take it to be any part of the definition itself intended to be laid down by him, that if any person stated that he had foreborne suing in a cause of action, which might or might not by possibility occasion a loss to him, that was a sufficient ground for an undertaking by another to pay him.” The following cases illustrate this principle, *Barber v. Fox* (d); *Hunt v. Swain* (e); *Fish v. Richardson* (f), *Jones v. Ashbournham* (g); *Tooley v. Windham* (h); *Price v. Easton* (i). In this case the consideration, if any, must be that of possible detriment to the plaintiff; now the promise was not to procure the discharge, but to consent to the discharge on payment of the debt and half the costs. This consent must be looked on in one of two ways, either as a consent to the discharge conditional upon the obtaining the consent of the plaintiff in the execution, namely, the trustee of the present plaintiff, or as a consent to the discharge without his permission.

(a) 3 Bur. 1673.

(b) 1 Wms. Saund. 211. b.

(c) 4 East. 468.

(d) 2 Wms. Saund. 135.

(e) 2 Wms. Saund. 137, in notis S. C. 1 Lev. 135. (f) 2 Saund. 137, in notis b. S. C.

Yelv. 55, 55, &amp; Cro. Jac. 47.

(g) 4 East. 455.

(h) Cro. Eliz. 206.

(i) 4 B. &amp; Al. 433. S. C. 1 Nev. &amp; M. 303.

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Looking at it in the former light, no detriment can be discovered, for as there is no allegation that that consent was obtained, it cannot be implied. That such implications will not be made, even after verdict, sufficiently appears from the cases already cited; but *Price v. Easton* is directly to the present purpose, for there, even after verdict, the consent of the plaintiff to the agreement between *Price* and the defendant could not be implied. But now, reasoning thus, if the consent was conditional, then the consent of the trustee being obtained, no possible detriment to the plaintiff can be discovered. To the debt, and to the debt alone, had the *cestui que trust* any claim; to the costs the trustee is entitled, in order to reimburse himself the costs of the action for which he is liable to the attorney he has employed. The only possible detriment then must be, that the trustee would have an equitable claim against the *cestui que trust* for the portion of costs which he had lost by the consent of the *cestui que trust*; but, in the present case, no such equity could arise, because the consent was conditional upon the consent of the trustee, the plaintiff in execution, and the discharge the result of that consent alone. But looking at the consent in the second point of view: the discharge by the sheriff without the permission of the plaintiff in execution, that is an illegal act, upon which no assumpsit can be founded, *Featherston v. Hutchinson* (a); *Harvy v. Gibbons* (b); *Martyn v. Blithman* (c); *Shevly v. Packer* (d); *Crozer v. Pilling* (e). But even waiving this argument, there would be no such equitable claim discoverable as would maintain an assumpsit, although in certain cases equitable considerations are recognised in courts of law. In *Smith v. Johns* (f) they have recognised the forbearance to sue for a legacy; the forbearance to sue for a debt by the assignee of it (g); and the release of an equity of redemption as good considerations, *Thorpe v. Thorpe* (h), and upon the statute of set-off, equitable claims have been recognised. With regard to the latter, the cases of *Bottomley v. Brooke*, and *Rudge v. Birch*, MSS. cited in *Winch v. Keeley* (i), have been ever since quarrelled with, and almost expressly overruled in *Tucker v. Tucker* (k), and as to the cases upon equitable considerations, they only go to the extent, that a right of property, the acknowledged creature of Courts of Equity, universally recognised and known, and only not enforceable in courts of law, may be the consideration for an assumpsit; but they do not go to the extent of shewing that courts of law will, upon an allegation of facts, spell out an equity to support an assumpsit, and that upon a statement

(a) Cro. Eliz. 199.

(b) Lev. pt. 2. 61.

(c) Yelv. 197.

(d) Rolls' R. 313.

(e) 4 B. &amp; C. 26.

(f) Cro. Jac. 257.

(g) 1 Wms. Saund 210 b. in notis

(h) 1 Ld. Ray (63

(i) 1 T. R. 621, 622.

(k) 4 B. &amp; Ad. 745, S. C. 1 Nev. &amp; M. 477.

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which would be sufficient to shew merely a claim even in a Court of Equity. The jealousy with which Courts of Law enter into the recognition of equitable rights, appears in *Bawerman v. Radenius* (a). As to the ground of demurrer to the second count, that no promise to the plaintiff is alleged, this is clearly bad on special demurrer, *Price v. Easton* (b). And the exception in *Bancks v. Camp* (c), makes the objection the more forcible in the present case. As to the third ground, that this is a collateral promise and no default in the principle shewn: first, it is a promise within the statute of frauds, "to be answerable for the debt of another;" secondly, in the case of all such promises, default in the principal must be shewn. As to the first position, see *Fish v. Hutchinson* (d), reported more fully in 2 *Lord Kenyon's notes of cases*, 537; and the principle is laid down with its exception by *Sir Fletcher Norton, arguendo*, and recognised by all the Judges in *Williams v. Leper* (e). *Tomlinson v. Gell* (f) is peculiarly in point with the present case. The exception was acted on in the case of *Goodman v. Chase* (g), where, the original debt being discharged, it was held, that the promise was original, and not collateral. But the present case does not come within the exception; for, first, the consent of the *cestui que trust* does not discharge the debt, without that of the trustee; and, secondly, even if the case here was as in *Goodman v. Chase*, the debt may continue after the discharge of the debtor out of execution by his creditor in Ireland, by the statute 35 G. 3, c. 30, s. 31, the law relating to which is laid down in *Rowe v. Murray* (h), and the cases in the notes to that case. And as to the second position on which this ground of demurrer is rested, it is necessary that the default in the principal should be alleged, 2 *Rolls Ab.* 733, *Battersby v. Brookbank* (i), *Morris v. Cleasby* (k), *Lelly v. Hunt* (l), and also in 2 *Chy. on Pleading*, 5 ed. 253, and the opinion in the note, which seems to be contradicted by the cases referred to.

Messrs. *Blake*, Q. C., and *M. Barry*, in support of the declaration. It is a sufficient consideration to support an assumpsit, that the plaintiff undertook to endeavour to perform any act, even a mere courtesy, at the request and instance of the defendant. *Lampleigh v. Braithwaite* (m), *Chitty on Contracts*, 27, and the cases there cited. For the purposes of this argument, it is admitted that the plaintiff in the execution was trustee for the present plaintiff, and that as such he recovered the judg-

(a) 7 T. R. 663.

(c) 9 Bing 604.

(c) 3 Borr. 1860.

(g) 1 B. &amp; Al. 297.

(i) Cro. Jac. 500.

(l) 11 Price, 491.

(b) 4 B. &amp; Ad. 433, S. C. 1 Nev. &amp; M. 133.

(d) 2 Wils. 84.

(f) 1 Nev. &amp; P. 588.

(h) 1 Hud. &amp; B. 300.

(k) 4 M. &amp; Sel. 574.

(m) Hobart, 105.

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ment, sued out execution, and detained the debtors of the trust estate in custody. The court will notice the relation of trustee and *cestui que trust*, and the equitable rights of the latter. In the case of *Thorpe v. Thorpe* (a), it was held, that the release of an equity of redemption was a good legal consideration, and the court said they would take notice that the mortgagor had a right to relief in Equity. The plaintiff in the present action was the party beneficially interested, to whom the plaintiff in the execution was liable to account in Equity, a circumstance rendering *his consent* to the discharge of the debtors such a benefit and advantage to them, as, having been obtained at the request of the defendant, amounts to a consideration sufficient to sustain the present action. The strict and due execution of his trust by the trustee would be intended by the court, and it was his duty to require the consent of the *cestui que trust* to the discharge of the debtors. This is the consideration averred in the declaration, and was a benefit obtained at the special instance of the defendant. In the case of *Payne v. Wilson* (b), the consideration was, that plaintiff would consent to suspend proceedings against a third person, and it was held good. The distinction attempted to be taken between the debt and costs had no foundation. The trustee would be entitled as against the *cestui que trust*, to an indemnity against all costs properly incurred, and to take credit for them, as against the trust. The present plaintiff having consented to the discharge of his debtors, the loss of the costs falls upon him. It had been argued, that the consent of the *cestui que trust*, without that of the trustee, would have rendered the discharge illegal on the part of the sheriff, and that if such was the consideration, it is void for illegality; but, conceding that it might be illegal, and subject the sheriff to an action, it is not the species of illegality for which a contract would be void. In order to bring the consideration in this case within that principle, it should, on the face of the declaration, appear to be immoral, contrary to public policy, or fraudulent. It is not contended that the illegality rests on either of these grounds. That the authority of the present plaintiff to enter into such a contract was sufficient, appears from the case of *Willatts v. Kennedy* (c). The declaration in that case stated that a third party was indebted to a firm, and that the plaintiff had been appointed, by the Court of Chancery, receiver of the debts of the firm, and that, in consideration that the plaintiff, as such receiver, would give the debtor two months' time, the defendant promised to pay; and it was held, that sufficient authority appeared for the plaintiff's contract, and sufficient consideration for the defendant's promise. The court will look into all the circumstances, and weigh them, to ascertain if they do not supply proof that the consideration was of some value, and moved from the plaintiff. *Lilly v. Hays* (d). This benefit conferred by

(a) 1 Lord Raym. 662. (b) 7 B. & C. 423. (c) 4 Bing. 5. (d) 1 Nev. & P. 26.

the present plaintiff is therefore a valid and sufficient consideration, and is averred with as much certainty as the rules of pleading require. The entire act to be done on the part of the plaintiff, namely, his consent to the discharge (which was the consideration for the promises of the defendant), is set forth in the declaration, with an averment that he did consent. This was all that was necessary. But, further, this cause of demurrer is not well assigned; it does not specify any particular in which the consideration is insufficiently stated. This ought to have been in accordance with the familiar principle, that a special demurrer ought to point out *particularly* in what the insufficiency consists, so as to enable the party whose pleading is objected to, to amend the informality complained of. *Varley v. Manton* (a) is a direct authority to prove, that where there is a general allegation of performance, and the other party wants a more specific one, he must point out the particularity he requires. The demurrer cannot, therefore, be allowed on this ground. The omission of any averment in the first count of the declaration, that the debtors were actually discharged, has been relied on. The case of *Pullin v. Stokes* (b) is an answer to this objection. There, the plaintiff having recovered a judgment against a third party, and a *fiery facias* being delivered to the sheriff, it was averred, that in consideration that the plaintiff, at the instance of the defendant, had requested the sheriff not to execute the writ, the defendant promised to pay the plaintiff the debt and costs, together with the sheriff's poundage, bailiffs' fees, and other charges. On a judgment by default, and error brought, the promise was holden to be binding on the defendant, though it was not averred that the sheriff did, in fact, desist from the execution, nor what the amount of the poundage, &c. was, nor that the defendant had notice of such amount. This case is directly in point, and the third count of the declaration contains such an averment, and is, therefore, free from the objection. With respect to the third cause of demurrer, viz., that the promises appear to be in the nature of a warranty, and that it is not shewn that there was any default made by the persons previously liable, the case of *Goodman v. Chase* (c) establishes, that where a defendant taken on a *ca. sa.* is discharged out of custody, the debt is extinguished, and that the promise of a third person to pay the debt is an original undertaking, and not within the statute of frauds. The insolvent acts in this country cannot change this principle; if the debtor have lands, the judgment affects them; but his person is discharged from all liability. The promise averred in the declaration is primary and absolute; and, on this argument, must be admitted to have been as stated; the demurrer, by suggesting it to be in the nature of a warranty, is argumentative, or, what at the equity side

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(a) 9 Bing. 363; S. C. 2 Mon. &amp; S. 184.

(b) 2 H. B. 312.

(c) 1 B. &amp; Al. 297.

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of the hall, would be termed a speaking demurrer. For these reasons, the demurrers to the first and third counts ought to be overruled.

Mr. *Dobbs* replied.—It is said, that a benefit conferred is sufficient to found a consideration; and that principle is not denied, so far as it is modified by Kenyon, C. J., in *Newrol v. Wallace* (a), where he says, “every person, who, in consideration of some advantage, either to himself, or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go;” this qualification runs through all the cases. When a person is arrested in execution, no one can effect his discharge, but the plaintiff on the record; and, therefore, the plaintiff in this case had not the power of conferring the benefit he promised; and upon this ground there is not a sufficient consideration to support the 1st or 3d counts. The meaning of the consideration being “illegal,” is not that it was contrary to law, but that it was an insufficient consideration. *Harvy v. Gibbons* (b). The principle which governs all the cases is, that the consideration must move from the plaintiff, and it was so held on motion in arrest of judgment in the last case on this subject. *Price v. Easton* (c). The plaintiff here had the power to consent to the debtors’ discharge, but the question is, had his consenting the power to obtain their discharge? The court cannot go out of the record to consider the equities which exist between the present plaintiff and the plaintiff in the execution; or consider third persons as parties to the cause. Per Kenyon, C. J., in *Bawerman v. Radanius* (d). The cases of *Bottomley v. Brooke* (e), and *Rudge v. Birch* (f), have been found fault with, and similar cases will not be carried farther; *Tucker v. Tucker* (g). Upon these authorities, the consideration for assumpsit must be a benefit to the defendant;—he who gives, must have, to the full extent, the power of conferring the benefit. A court of law cannot look to any party in a suit, but to those on the record—and the plaintiff on the record can alone discharge a party taken in execution; and, upon these grounds, the consent of the plaintiff in this action was inoperative, and could not raise a consideration. It is said, the consent of the plaintiff in the execution may be implied; if the court would imply such a consent, in *Price v. Easton*, the consideration would be good; but it was there held, that even after verdict, it could not be implied. In *Clarke v. Gray* (h), Lord Ellenborough says, “it is sufficient to state in the declaration “so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and “the entire act which is to be done in virtue of such consideration;” but all this is requisite, and in the present case, the consent of the plaintiff

(a) 3 T. R. 17. 22. (b) 1 Lev. 2d. pt. 161. (c) 4 B. &amp; Ad. 433.

(d) 7 T. R. 668. (e) 1 T. R. 621. (f) 1 T. R. 622.

(g) 4 B. &amp; Ad. 745. (h) 6 East 568.

is an important part of the consideration, and ought to have been averred. The same principle was acted on in *Brealey v. Andrew* (a), where the court refused to imply that the plaintiff, in proving for money had and received, had waived a tort, where such waiver would make the consideration good. A promise, by the defendant, to pay what at law the plaintiff is not entitled to receive, is a *nudum pactum*; *Clay v. Willis* (b). And in this case the plaintiff was not entitled to the costs of the former suit, a part of which, the defendant promised to pay. As to the second objection, the case of *Goodman v. Chase*, if the law in this country was the same as in England, would shew that the debt is satisfied by the discharge of the principal; but here, by the 35 G. c. 30, s. 31, the discharge of the principal is not an extinguishment of the debt. The test, as to whether a promise to pay the debt of another is collateral or not, is whether the promise extinguished the debt; if the original debtor remains liable, the promise is collateral; and the same principle is laid down by Holt, C.J., in *Hart v. Longfield* (c). In the present case, the undertaking was, to pay the debts of others, and the original debtors were not discharged. *Brien v. Brien* (d).

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BURTON, J.,\* this day delivered the judgment of the court. (After stating the pleadings), his Lordship said, it was unnecessary to refer to the second count, as it has been admitted by plaintiff's counsel, that the demurrer to that count must be allowed. With respect to the third count, it appears to us that the demurrer to this count must be allowed, upon one of the causes which has been assigned, namely, that it is not shewn by it that the defendant was primarily liable to the demand; or that he has become liable to it by the default of the party primarily liable to it. The promise alleged against the defendant, is to be answerable for costs, but not a promise to pay the costs at all events; not a promise to discharge those primarily liable. And by the 35 G. 3, c. 30, s. 31, they remain liable to them after their discharge. There is no averment here that those costs have not been paid, consequently, they might have been paid by these primarily liable, and upon this ground, the demurrer to this count must be allowed. The case then rests upon the first count, which has been most relied on. To this count, the same objection applies as to the third; that is the want of an averment, that the costs remain due and unpaid. This can only be supported upon the principle, that the defendant's promise was absolute, and that immediate performance of it might have been enforced, that being the meaning of the aver-

(a) A. & E. 109. (b) B. & C. 364. (c) Mod. 149. (d) 1 H. & B. 300, *in notis*.

\* The Lord Chief Justice was prevented by indisposition from attending Court during the greater part of the argument.



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ment "upon request." This is, therefore, merely an averment of a legal interest from the terms ; and therefore, the same objection is applicable to this count, as to the third ; and the cause of demurrer assigned is proper ; but to this count, there is another objection within the causes of demurrer assigned, namely, that it does not state a good legal consideration. It is to be observed, that any averment of persons being discharged from arrest upon consent, in order to make it a good consideration, it must be a consent from the plaintiff in the execution ; and it does not appear in this count that such consent was given ; but the case does not rest here ; it is to be remembered that the consent, if made, was revocable between the plaintiff and defendant, and there ought to have been an averment, not only that the plaintiff had given that consent, but also, that the consent continued, and was in force at the time of bringing the action. Until the first of these is shewn, no benefit is conferred, and if given and revoked, it would not be a good consideration and might be fraudulent. On these grounds, the demurrer to this count must be allowed, for the causes assigned. But I wish not to be understood to say that this count would be free from objection, if the causes assigned did not exist. I cannot say, that the nature and extent of the trust is sufficiently stated to support the count. The statement, that one person was trustee for another, is not, in my opinion, sufficient ; it is calling on the court to infer too much, in reference to the nature of the trust, and the duties of the trustee. It ought to have been stated how the trust was created. This is, however, but my individual opinion ; and, upon the grounds already stated, the demurrers to the three counts must be allowed.

Demurrer allowed.

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*Tuesday, April 23d.*

### EXECUTOR—PASSING SECURITIES—DISCHARGE OF ASSETS.

CARRIGAN v. MULLOWNEY.

Where A. died, having two accommodation acceptances of B.'s out, and which did not become due until after his death, when a third person, who made himself liable as executor *de son tort* to A. took them up, by passing his own drafts upon another person in lieu of them, and which it appeared B. took in satisfaction of the debt : *Held*, that the passing of these securities by the executor, was a discharge of the assets to the amount of such securities, and so far a due administration of the assets by the executor.

ASSUMPSIT for goods sold and delivered. The action was brought against the defendant as the executor of Daniel Mallowney, deceased, and the declaration contained only the common counts, on promises by the deceased. The defendant pleaded *plene administravit*, which the

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plaintiff in his replication denied, and issue was joined thereon. The case came on for trial at the last Summer Assizes for the city of Waterford, before CRAMPTON, J. It appeared in evidence on behalf of the plaintiff, that the defendant had rendered himself liable, as executor *de son tort*, and that assets of the said Daniel Mullooney, to the amount of about £94, had come to his hands. On the part of the defendant, it was proved that he had made payments to the amount of over £45. It was also proved, that one Joseph Walsh accepted two bills of £56 and £80, for the accommodation of the said Daniel Mullooney; that these bills did not become due until after the death of the said Daniel Mullooney, and that the defendant then took them up by passing, in lieu of them, his draft upon a third party in favor of the said Joseph Walsh, which bills, it appeared, were not due at the time of the trial. Counsel for the defendant called upon the learned Judge to leave this question to the jury, whether the said bills, so passed by the defendant, were accepted by the said Joseph Walsh in satisfaction of his demand against the assets of the deceased, and, if so, to direct them to find for the defendant; but this being objected to by the plaintiff's counsel, his Lordship declined to do so, and reserved the point, with liberty to the defendant's counsel to move to have a verdict entered for the defendant; and, subject thereto, the jury found a verdict for the plaintiff for £48 : 16 : 5. Mr. Hatchell, Q. C., on a former day, obtained a conditional order to set aside the verdict had for the plaintiff in this case, and that a verdict for the defendant should be entered; against which,

Mr. Alcock, with whom was Mr. Brewster, Q. C., now shewed cause. A bill of exchange is only *prima facie* evidence of payment, as between debtor and creditor; 2 *Stark. on Ev.* 2 ed. 184; *Kearslake v. Morgan* (a); *Baily on Bills*, 361. The question is, whether the giving this bill by an executor *de son tort* is a good payment, as against creditors of the same degree? The law regards the acts of such executors with the greatest strictness, and it will not suffer them to deal with the assets in the way a rightful executor may. For instance, a rightful executor may retain assets for a debt due to himself, which an executor *de son tort* will not be permitted to do: *Coulter's Case* (b); *Oxenham v. Clapp* (c). And so also, although a rightful executor may retain assets to meet his liability in accepting a bill, a wrongful executor will not be permitted to do so. The statute of frauds requires the promise of an executor to be in writing, and for a good consideration, in order to be binding; and, in this case, it does not appear for what consideration the bills were passed.

(a) 5 T.R. 513

(b) 5 Rep. 51.

(c) 2 B. &amp; Ad. 509.

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Mr. *Hatchell*, Q. C., and Mr. *Fogarty*, Q. C., *contra*.—The security which the creditor accepted of, prevents him from again returning to the assets, and therefore to that amount the assets are discharged. The objection as to a wrongful executor not being allowed to retain for his own debt, does not apply to this case; the rule is, that he cannot avail himself of his own wrong to *benefit himself*, and it is so laid down by Paterson, J. in *Oxenham v. Clapp* (a). There was no preference here, to any creditor, for the bills were passed before the present action was commenced. Suppose an executor disposed of the assets on credit, and a creditor requires payment, and the executor offers a bill until the credit he has given on the assets has expired, which is accepted of, what objection can there be to such a proceeding? And that is the case here.—[BUSHE, C. J. If this bill is never paid will the estate be discharged?] That is our position; and in a recent case in the Exchequer, where an executor passed a promissory note, he was made answerable for the debt. If the assets were discharged at the time of passing the bill, no injury is done. If there was at that time positive payment, then there could be no question between creditors in the same degree, *Childs v. Monnins* (b). In *Gillies v. Smither* (c), it was decided, that the defendant might shew that he had a right to retain the expenses of administering and it was so decided upon the ground that he had made himself personally liable. The present is a stronger case, for there is a subsisting debt, and no creditor injured, and no question that the defendant has made himself personally liable to Walsh. If the plaintiff should succeed, the defendant will have, not only to pay him, but also, to pay the amount of the acceptance to Walsh, although he will not have one penny out of the assets of the deceased to meet the latter demand.

Mr. *Brewster*, Q. C. replied.—The case of *Gillies v. Smither* is upon a debt which must be paid in the first instance. The plea in the present case is, that the defendant has paid off the assets, and the evidence he gives of that is, that he has contracted a debt. If he had assets in his hands this would be a good consideration, but it would not change the case from a promise to pay if he should have assets. There is no difference in the cases from the passing of the bill, they are two continuing debts.—[PERRIN, J. The difficulty you have to contend with is this, that they had evidence that the bills were taken in satisfaction of the debt due on the testator's bill.]—Then it comes to the question, whether accepting these bills in satisfaction of the debt due by the testator is a discharge of the assets?—[BURTON, J. If the defendant had paid the debt instead of passing the bills, the case would then be

(a) 2 B. &amp; Ad. 339.

(b) 2 Brod. &amp; R. 460.

(c) 2 Stark. R. 528.

clearly with the defendant;—[BURTON, J. If the creditor then accepts the bills in satisfaction of the debt, it seems to me to be the same, and that he could not come against the assets.]—If a bill in equity were filed, and it were proved that these bills were not paid, would the passing of those be an answer to the creditor's demand?—[BUSHE, C. J. If the bills are not paid, he can sue the executor.]—That is quite true; but the question is, whether giving a security for a debt is an extinguishment of the debt.—[BURTON, J. I cannot see, where these bills are taken in satisfaction of payment, that the assets are not discharged.]—Mr. *Brewster* declined pressing the question further.

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The COURT, upon the grounds stated in support of the motion, made  
The rule absolute.

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## CRIMINAL INFORMATION—AFFIDAVIT IN SUPPORT OF.

The QUEEN at the prosecution of *PEARCE v. MAUNSELL*.

This was an application for liberty to file a criminal information against the defendant. The affidavit set forth a quantity of very violent and abusive language used by the defendant to the prosecutor, but did not contain any allegation that the language of the defendant, which was complained of, was used with an intention to provoke the prosecutor to fight a duel.

BURTON, J.—Inquired if there was such an allegation in the affidavit.\*

Mr. *Scott, Q. C.*, for the prosecutor, stated that the prosecutor's affidavit did not contain that allegation, and he then read a passage to that effect, from an affidavit made by a third party who was present on the occasion, out of which this application arose, and which was filed in support of the motion.

*Per Curiam*.—Take a conditional order.

A conditional order for liberty to file a criminal information will be granted, although the prosecutor does not swear that he believes the defendant's language was used with an intention to provoke him to fight a duel; if a third party who was present on the occasion out of which the prosecution arose, make an affidavit to that effect.

\* In *Rex v. Byrne*, 1 Hud. and B. 16, the court held the affidavit defective for not containing this allegation, and stated "that they never interfered, unless the ap-

plicant swore that he believed "the words were used with the intention of provoking him to fight a duel."

## COMMON PLEAS.

*Monday, April 29th.*NEW TRIAL—LANDLORD AND TENANT—DISTRESS  
FOR RENT—TRESPASS.

PURCELL v. NOLAN.

An agreement to change the gale days on which rent is to be paid and ascertaining the fraction payable on the then last new gale day, will be evidence to go to the jury of rent being in arrear on that day so as to support a distress.

A defendant being a landlord and served in trespass *q. c. f.* may justify under the general issue, not only an entry in order to distrain but also the continuing in possession beyond the time that was necessary for the purposes of the distress.

Courts refuse to grant a new trial where the damages would be necessarily nominal and no title in question.

This was an action of trespass *quare clausum fregit*: the first count of the declaration stated, that the defendant broke and entered a dwelling house of the plaintiff's at Naas, and then and there made a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance for a long time, to wit, from thence hitherto, and then and there took some goods. The second count was, for breaking and entering a dwelling house, and expelling plaintiff therefrom. Third count *de bonis asportatis*. The defendant pleaded the general issue to the whole declaration, and as to the expulsion in the second count he pleaded leave and licence, on which issue was joined. The case was tried at the last Lent Assizes for the county of Kildare, before DOHERTY, C. J. when a verdict was found for the defendant. On the trial it appeared, that the plaintiff held a house in Naas from defendant, at a rent of £18 a year, payable in January and July: that in the month of October last, it had been agreed between the plaintiff and defendant, that the gale days were to be changed, and that the plaintiff was to become a March and September tenant, and thereupon the amount of rent from July, (up to which time plaintiff had paid her rent), to the 29th of September, was ascertained. That on the 17th December last, defendant, hearing that the plaintiff had left, and was about to have the furniture removed, distrained for the rent due in September, and having done so, plaintiff's son-in-law, who was left in care of the premises, gave up the house to defendant. The learned Judge left it to the jury to say (amongst other questions upon which no argument arose), that if they believed that the gale days were changed, and that rent was due in September, they were to find for the defendant, and that if they believed the evidence as to the giving up possession, also to find for the defendant, on the plea of leave and license.

Mr. James Plunkett, on a former day, having made objections on the trial, obtained a conditional order for setting aside the verdict, on the ground, that there was no evidence to go the jury, of rent being in arrear, and secondly, that the learned Judge should have told the jury,

that, as in the first count of the declaration, a breaking and entering the dwelling house, &c., and continuing therein was stated, and admitted to have been proved by the evidence, but not covered by the plea of leave and license which was not to the first count, that they, the jury, should find for the plaintiff.

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Mr. *Martley*, Q. C., this day shewed cause, and contended, first, that the agreement to change the gale days ascertained the rent, and was evidence to go to the jury, of rent being due. Secondly, that the 15 G. 2, c. 8, s. 10, enables any person entitled to rents or services of any kind, relating to any entry by virtue of the act, or otherwise, upon the premises chargeable with such rents and services, or any distress or sale thereupon, to plead the general issue, and to give the special matter in evidence, and that the continuing in possession was relating to the entry, and that it was not necessary for the defendant to have pleaded leave and license; that all the cases in England wanted the fact, which this case had, namely, that here, the landlord's right to continue was found by the jury, so that no damages could be given, even if a new trial were granted; and under these circumstances, and in frivolous actions, courts refuse new trials, *Macrow v. Hull* (a); *Farewell v. Chaffey* (b).

Mr. *James Plunkett*, in support of the rule.—There is no authority to shew, that after rent is due, the party can, by changing the gale day, give a right to distress. Here, the alleged agreement is in October, settling that the rent was due in September.—[TORRENS, J. Suppose an agreement in writing, providing that a party should have power of distress for the rent then due.]—There is no authority to shew, that such an agreement would be effectual; all are as to rent to become due, and not by-gone rents. In this country there is no enactment similar to that in England, providing that a landlord, guilty of an irregularity as to a distress, shall not be considered a trespasser *ab initio*, so that every day the landlord continued in possession beyond what was necessary, he is a trespasser, *Winterbourne v. Morgan* (c); *Ether-ton v. Popplewell* (d). As to courts refusing new trials on the ground of the smallness of the matter in dispute or the trifling nature of the actions, there is no instance where there has been a misdirection, in which a new trial has been withheld.

Mr. *Bland* in reply.—The case of *Charters v. Sherrock* (e), which decides, that a landlord can distrain for rent agreed to be paid in advance, is a stronger case than the present, which is a contract of the

(a) 1 Burr. 11.

(b) 1 Burr. 53.

(c) 11 East. 395.

(d) 1 East. 139.

( ) 1 Al. &amp; Nap. 506.

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parties that rent was to be paid in September, and the right of distress is incident to that rent. The case of *Ashcroft v. Bonner* (a) decides, that a landlord may justify, under the general issue, the expelling a tenant where he entered claiming rent, and here it was unnecessary, even to the second count.

COURT.—We are of opinion that the cause shewn should be allowed, as we think there was evidence to go to the jury of rent being in arrear; and upon the second part, that it was competent for the defendant to justify the continuing in possession under the general issue, as part of the special facts relating to the entry; and even if it were otherwise, this is not such a case as we should give a new trial, considering the trifling and frivolous nature of the action, and that no substantial damages could be expected.

Rule discharged.

(a) 3 B. & Adol. 684.

## EXCHEQUER OF PLEAS.

*Wednesday, January 23d.*

## INSOLVENT—TRESPASS—ASSIGNEE.

ASPINALL *v.* ARROTT.

**TRESPASS.**—The declaration contained three counts: First, for breaking and entering on the 6th day of March, 1837, and on divers other days and times, &c., a certain dwelling house of the plaintiff, situate, &c., and then and there making a great noise and disturbance therein, and staying and continuing therein, making such noise and disturbance for twenty-four hours then next following; and then and there forcing and breaking open divers doors of the said plaintiff of and belonging to his said dwelling house, and breaking to pieces, damaging, and spoiling divers locks and hinges of and belonging to the said doors respectively, and wherewith the same were then fastened, &c.; and also, during the time aforesaid, to wit on, &c., seizing and taking divers the furniture, goods, chattels and effects, and also, the necessary working tools of the plaintiff in his trade and business of a cabinet maker (enumerating and describing them), there found, and being in the said dwelling house, and carrying away and converting the same to his own use; by means of which said several premises, he the said plaintiff and his family were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said dwelling house of the said plaintiff, but also, the said plaintiff was, during all that time, hindered and prevented from carrying on his said necessary trade and business of a cabinet maker, to wit, &c.

The second count was for seizing and taking away the furniture, goods, chattels and effects, and also the necessary working tools of the plaintiff, and stated special damage, by reason of his having been prevented from carrying on his trade, and been deprived of the services and assistance of his apprentice.

Third count *de bonis asportatis*. Pleas—first, not guilty; second, as to the seizing, taking, carrying away, and conversion of the furniture, goods, chattels and effects in the first and third counts mentioned (except the bedding of the plaintiff and his family, and the necessary working tools and implements, and such other necessities therein mentioned), *actio non*, because after the said seizing, taking, carrying away, and conversion of the said furniture, goods, chattels and effects, the plaintiff being a prisoner in actual custody, &c., upon process for debt, &c.,

An action of trespass for breaking and entering plaintiff's dwelling house and seizing and taking his furniture, goods, chattels and effects, and converting the same to the defendant's use, may be maintained by a person who has, subsequently to such trespass, but before the commencement of the action, become insolvent and executed the usual assignment to the provisional assignee, as the plaintiff is entitled to recover compensation for the injury sustained by him during the interval between the committing of the trespass and the execution of the assignment, and the right of action to that extent does not pass to the provisional assignee under the assignment.



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did according to the statute, 1 & 2 G. 4, c. 59, apply by petition to the court for the relief of insolvent debtors, for his discharge, &c., and that plaintiff then executed an assignment to the provisional assignee of the said court, of all the estate, right, title, interest and trust of the plaintiff, in and to all the real and personal estate and effects of the plaintiff, &c. (except the wearing apparel and bedding, and the working tools, &c., of the plaintiff and his family, not exceeding £20), and that said assignment, &c., vested *the said causes of action* and the said furniture, goods, chattels and effects, &c., (except as aforesaid) and all the right, title, interest and trust of the plaintiff, of and to the same in the said provisional assignee; and that the same were still lawfully vested in the said assignee, &c.; and that the said court afterwards, &c., adjudged the plaintiff to be entitled to the benefit of the said act, and ordered the plaintiff to be discharged from such custody as aforesaid; verification. Replication; *similiter* to first plea; demurrer to second plea; and special causes assigned:—First, that the defendant had not shewn any excuse or justification for the committing of the said several trespasses, in the introductory part of that plea mentioned, nor had he thereby given any answer to the plaintiff's said declaration, in regard to the committing of those trespasses, and also, that he had not thereby in any way justified the seizing, taking, carrying away and conversion of the said furniture, goods, chattels and effects therein mentioned, nor shewn any sufficient cause to deprive the plaintiff of his right to recover damages, because of the loss and inconvenience sustained by him and his family from the seizing, &c., of those goods, in the interval previous to the assignment to the said provisional assignee. Secondly, that the said defendant had not, by his said second plea, shewn or averred that the said plaintiff had ever ceased to have possession of the goods and chattels in the said second plea mentioned, nor shewn any right in him the said defendant, to seize, take, carry away and convert the same. Thirdly, that he had not shewn that the causes of action, in the second plea mentioned, were at all transferred to, and vested in the said provisional assignee, or how those causes of action were so transferred, and that in alleging such transfer, he had sought to put matter of law in issue, &c. Joinder in demurrer.

Mr. T. K. Lowry, in support of the demurrer.—This is an action of trespass, which no one can maintain but the person in actual possession of the property, at the time of the commission of the trespass, which could therefore be only maintained, if at all, by the plaintiff who had such actual occupation. In no other form of action, could compensation for the whole injury sustained in this case be recovered. If an action of *trover* had been brought by the insolvent's assignee for these goods, no compensa-

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tion could have been recovered in that form of action for the loss and inconvenience sustained by the insolvent and his family, previous to the assignment under the insolvency. What is the nature of that assignment? The 1 & 2 G. 4, c. 59, s. 8, provides, that "such prisoner shall, at the time of subscribing such petition, duly execute a conveyance and assignment to the provisional assignee of the said court, in such manner and form as the said court shall direct, of all the estate, right, title, interest, and trust of such prisoner, to all the real and personal estate and effects of every such prisoner (excepting the wearing apparel and bedding, and the working tools, implements, and other such necessities of such prisoner, and his or her family, not exceeding in the whole the value of £20), so as to vest all such real and personal estate and effects in the said provisional assignee of the said court." In 1 *Chitty on Plea*, p. 72, 6th ed., it is said, "with regard to remedies for personal torts, they do not appear to pass to the insolvent's assignee; it would seem he retains the right of action." In the case of *Lea v. Telfer* (a), in speaking of the property which passes under such an assignment, Abbott, C. J. says, "I consider the case of an insolvent analogous to that of a bankrupt." In *Benson v. Flower* (b), it was held, that a right to recover in an action on the case for words before judgment, cannot be assigned under a commission of bankrupt, but after judgment when the damages have been reduced to a certainty, it may; and the reason for this is obvious, because it then becomes a positive pecuniary debt. In *Clarke v. Calvert* (c), Dallas, C. J. says "All the cases on the subject merely decide, that all the property of the bankrupt, and consequently all the powers to turn that property to profit, vests in the assignees." And, in a note by *Sir William Evans* to his Collection of Statutes, Vol. 4, p. 329, he says, "that no action will lie by assignees for a mere personal tort to the bankrupt, such as assault or defamation, is very manifest; and it is settled, that though assignees may maintain *trover*, they cannot maintain *trespass* for taking goods."

But whether all rights of action pass or not by this assignment, the question is, has a stranger any right whatever to interfere between the insolvent and his assignee? In the case of *Fowler v. Down* (d), Eyre, C. J. says, "what shall be done between the bankrupt and the assignees is one thing, and what between him and a stranger is another. This narrow ground, that the bankrupt has a right against every body but the assignees, which is maintained by authorities, is sufficient to support the verdict." And again, "It is not competent to a third person to dispute the bankrupt's title to recover, who, supposing his creditors had no claims upon him, would

(a) 1 C. &amp; P. 105.

(b) Sir Wm Jones's Rep. 215.

(c) 3 B. Moore 112; S. C. 8 Taunt. 742.

(d) 7 East 325; S. C. 1 B. &amp; P. 47.

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"be entitled to his action, because whether they have such claims or not "is nothing to the stranger." In *Webb v. Fox* (a) it was held, upon the authority of *Fowler v. Down*, that a bankrupt had a right to maintain an action of *trover* for goods against all the world but his assignees. In *Clarke v. Calvert* (before cited), where a precisely similar plea was pleaded to that in this case, it was held on demurrer, that trespass *quare clausum fregit* may be maintained against a stranger, by a tenant of the land, for a trespass committed before his bankruptcy; and Dallas, C. J., in delivering the judgment of the Court, said, "the court "need decide nothing as to the question, whether the assignees might "be entitled to demand from the bankrupt the damages he might re- "cover in this action. It seems clear, that as against all the world, "except the assignees, the bankrupt has a clear right of action *quare "clausum fregit*. For if this were not held, and if the assignees allowed "him to remain in possession of premises he before occupied, as consi- "dering them a kind of *damnosa hereditas*, as in *Turner v. Richard- "son* (b), not worth their attention, it would follow, that every civil out- "rage might be committed on the property, without the least means of "redress. The assignees here have not interfered, and therefore no "other person has a right to do so. This subject was much considered in "*Fowler v. Down*, and though there be a difference in one fact, the "general doctrine there laid down applies most strongly to this case. "To the same effect is the case of *Webb v. Fox*, where it was held, that "a bankrupt has a right to maintain an action of *trover* for goods against "all the world but his assignees. It is true, both these cases of *Fowler v. "Down*, and *Webb v. Fox*, were cases of property:—be it so. That is "still stronger, for if the courts so held in cases of property, *a fortiori* "would they be bound to hold so where the subject matter is a tort really "so called, and where the action is possessory, and can only be brought by "him who is in the actual possession of the land, the subject of the inquiry. "It is true also, that in both these actions the subject was property acquired "after bankruptcy; but, in both, the bankrupts were uncertified, and it re- "quires no argument to prove, that, generally speaking (though subject "to exception), property acquired after the bankruptcy, and before the "certificate, is the property of the creditor. This was fully settled in the "case of *Kitchen v. Bartsch* (c). The general doctrine was confirmed, "if confirmation were necessary, by Lord Chief Justice Gibbs, in "*Cumming v. Roebuck* (d), where he says, 'Unless the assignees inter- "pose, the plaintiff may maintain the action; he may sue as their trus- "tee.' With this weight of authority upon the general point, namely, "that the assignees have not interposed their claims, if any they had, and

(a) 7 T. R. 391.

(c) 7 East. 51.

(b) 7 East. 335.

(d) 1 Holt. N. P. C. 172.

"considering the nature of this action against a wrong-doer for an injury to the actual possession of the plaintiffs, it should seem that this action is well brought, and that, therefore, the demurrer to the first and second pleas ought to be allowed." The case of *Lea v. Telfer*, also before referred to, which was decided by C. J. Abbott, sitting at *Nisi Prius*, appears, at first sight, to be an authority in favor of the defendant's plea, and it certainly is in opposition to the cases above cited; but, on examination, it will be found to be an authority in favor of the plaintiff. In that case, it was held, that an insolvent could not maintain *trover* for certain articles of plate which had been his property before his discharge, even where the assignee did not interfere; but, in that very case, C. J. Abbott, in giving judgment, expressly says, "There may be *possession against a wrong doer*, but there is no *property to support trover*." So that, whether or not that case shall be considered as overruling the former cases, as to the right of bankrupts or insolvents to bring *trover* for goods passing to their assignees, where the assignees do not interfere, it goes to establish the right of insolvents to bring *trespass* against wrong doers, and entitles the plaintiff to judgment on the present demurrer.

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Mr. Robert Andrews, *contra*. The cases which have been cited are, for the most part, cases in bankruptcy, where the question turned upon property acquired by the bankrupt after the bankruptcy, and to which, as against all persons except his assignees, the bankrupt had a title. None of those cases touch the question where the property or cause of action had existence before the bankruptcy, and, therefore, passed directly under the assignment to the assignee. That distinction is important in this case; for here, the whole of the alleged cause of action, as justified by the plea, accrued before the assignment to the provisional assignee; and therefore it is not a matter of option with the assignee, whether he shall accept it or not. It is a question of mere law, did it pass to the assignee, or did it not? The defendant contends that the cause of action which is justified by the plea *did* pass by the assignment to the provisional assignee. The justification applies only to the seizing and taking of the plaintiff's property previously to his insolvency. By the assignment to the provisional assignee, all the estate, right, title, and *interest* in and to *all* the personal estate of the insolvent passes to the assignee, and *all rights of action in respect to that personal estate*. The plea does not affect to justify any personal *tort*; it is confined to the seizing and taking of that property, which clearly passed by the assignment, *Wright v. Fairfield* (a). In that case, it was held, that the assignee could maintain an action for unliquidated damages which had accrued before the bankruptcy, by non-performance of a contract; and

(a) 2 B. &amp; A. 717.

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Lord Tenterden said, there was no doubt the subject-matter of the action came within one or other of the descriptions in the statute; and he referred to the words therein, "*all the present and future personal estate*;" adding, "that if it were held a claim of that kind did not vest in the assignees, the consequence would be, that a right to damages, which would have been highly beneficial to the estate, might be released by the bankrupt. And Parke, J. there says, "Actions have been constantly maintained by assignees, for *torts*, to the personal property of "the bankrupt, committed *before* the bankruptcy, and rendering that "property less valuable to them."—[PENNEFATHER, B. But I take it that a bankrupt or an insolvent retains an interest in the possession of the property until his assignee interferes. The assignment passes the real just as much as the personal estate; and if it be conceded, that an insolvent may maintain an action for an injury to the real estate of which he is in possession (as the authorities shew he can), may he not equally maintain an action for an injury to the personal estate of which he is in possession? Where is the distinction?—The authorities only extend to cases of injury to the possession of a bankrupt or insolvent, *after* the bankruptcy or insolvency. Such a possession is wisely protected against every wrong-doer. But the same principles do not apply to acts which occurred previous to the insolvency. Lord Tenterden states this distinction in *Lea v. Telfer* (a). "I consider the case of an insolvent as analogous to that of a bankrupt, and a bankrupt may maintain trover for *after-acquired* property, unless the assignee interferes, *but not for any property which he had before the bankruptcy*." The second plea does not justify the breaking and entering of the plaintiff's dwelling-house, or any personal *tort*. If the plaintiff has sustained any injury by the breaking and entering of his dwelling-house, or the other matters not covered by the second plea, he has his remedy, the general issue being pleaded to all that. The second plea does not extend to the second count, in which the special damage is stated. It justifies only the taking and conversion of the goods mentioned in the first and third counts, in which no special damage is laid.—[PENNEFATHER, B. Every trespass of this kind implies an injury to the possession; and, to sustain his action, it is not necessary to state *special* damage. The law implies that every trespass is attended with damage, called "*general*," and the party may prove it without pleading it. Such damage is implied in the nature of the action.]—It cannot be doubted that this would be a good plea in *trover*, *Lea v. Telfer* (a). In that case, Lord Tenterden observes, "The question is, whether a man, who is discharged under the insolvent debtors' act, and who, "in consequence, has assigned his property, can bring an action of trover? "*The assignee might do it, and, therefore, the insolvent cannot.*" And is

(a) 1 C. &amp; P. 146.

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not this, in substance, an action of trover, so far as this plea extends? The case of *Clarke v. Calvert* (a) is very distinguishable from this. It was decided on very special grounds, and on the precise nature of the action. C. J. Dallas says, "This is an action of trespass for an injury done to the soil, and which no one can maintain but he who is in actual possession of it." Here the assignee can maintain an action for the taking of these very goods, and, from the form of the plaintiff's action, unless the defendant can plead as he has done, he will be liable to another action at the suit of the assignee, contrary to the maxim, *nemo bis vexari debet*.—[PENNEFATHER, B. It is true, the assignee might recover for the full value of the goods, and the insolvent for the injury he has sustained, by being deprived of the use of them for a limited time, and the defendant might thus perhaps be liable to two actions, but they would be for different causes. This case cannot be argued as if it were an action of trover. To assimilate it completely to that form of action, the plea ought only to have justified the conversion, and not the seizing and taking of the goods.]—That would have been a bad plea in trespass.—[PENNEFATHER, B. It would; and that very circumstance shews that this is an improper plea in the present case. RICHARDS, B. In the case of bailor and bailee, either one or the other can maintain an action; and yet, in answer to an action brought by the one, it is not sufficient to say that an action for the same thing may be brought by the other; but that is exactly what is said here.]—There is privity between the bailor and bailee, and the authorised act of the one is conclusive against the other; but they cannot both successfully bring actions for the same thing. Between the assignee and insolvent, however, there is no privity resembling that between bailor and bailee, where the cause of action accrued before the bankruptcy or insolvency.—[PENNEFATHER, B. As to the want of privity, that position may be laid down too broadly. In the case of the bankrupt suing for his own earnings after bankruptcy, and before certificate, he is the proper person to sue; and that, too, not from any supposed privity, but from the nature of the cause of action (b). From the nature of the case here, the insolvent is entitled to maintain this action for the injury sustained by himself, in consequence of the taking of the goods out of his possession. As to the argument, that the defendant would be liable to actions, at the suit both of the insolvent and his assignee, that would not be harder than the case of separate actions brought by the lessee and the reversioner. CHIEF BARON. There would be a wrong without a remedy, if the plaintiff could not maintain an action for the injury, so far as it relates to the loss sustained by him personally, in being deprived of the goods during the in-

(a) 8 Taunt. 742.

(b) See, accordingly, *Chippendale v. Tomlinson*, Cooke's Bankrupt Laws.

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terval between the seizure and his insolvency. It can scarcely be contended that the assignee could maintain an action for that portion of the injury; and, if he cannot, surely the insolvent can.]—In the case of separate actions brought by the lessee and the reversioner, the lessee recovers for the injury, so far as it affects his possession, and the reversioner for the injury, so far as it affects his reversionary interest: but the total amount recovered, and so apportioned, is intended to compensate the entire damage, and no more. Here, according to the argument of the plaintiff, the insolvent may recover not only for the personal deprivation, but for the value of the goods; and, if so, it is clear, the verdict in this case could not be afterwards used to prevent the assignee from recovering the value of the goods also, in case he brought an action of trover.

Mr. *Nelson*, in reply, was stopped by the Court, who

Allowed the demurrer.

*Saturday, January 26th.*

PRACTICE—JUDGMENT AS IN CASE OF A NONSUIT—  
PROVISO.

WRIGHT and PERRIN v. HODGENS.

Where a cause has been entered for trial, but not tried, and the plaintiff has been guilty of no default, by withdrawing the record, or otherwise, the defendant cannot have judgment as in case of a nonsuit; his remedy is to bring the case to trial by *proviso*.

Mr. *Hatchell*, Q. C. moved to enter judgment as in case of a nonsuit, the cause having been more than three terms at issue. The record had been entered in the list of causes for trial, but had not been tried, in consequence of the death of the late Chief Baron. No proceedings had been since taken by the plaintiff.

Mr. *Peebles*, *contra*, cited *Malone v. Nicholson* (a), and *Williams v. Stewart* (b), and contended that this was not a case within the statute (c). The defendant's proper course was to bring the case to trial by *proviso*.

Mr. *Hatchell*, in reply, endeavoured to distinguish this case from a

The rule, in this respect, is the same both in town and country causes.

(a) 6 Law Rec. (2d Ser.) 280.

(b) 4 Law Rec. (2d Ser.) 171.

(c) 28 G. 3, c. 31 Ir. 14 G. 2, c. 17, Eng.

country cause, which, he admitted, would not be within the statute; and referred to *Burton v. Harrison* (a), and *Gadd v. Bennett* (b).

The COURT said, that the case of *Burton v. Harrison* was clearly distinguishable from the present, as the plaintiff had there withdrawn the record, after having entered it for trial; but, here, it was not through any default on the part of the plaintiff that the case had not been tried. With respect to the distinction which had been suggested between town and country causes, the court were not aware of any such distinction having been allowed to prevail.

The cases cited against the motion were town, and not country causes, and they conceived the rule in this respect to be the same in both.

Motion refused, but without costs, the plaintiffs having obtained the costs of discharging a notice of the same motion on a former day.

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(a) 1 East, 346.

(b) 2 B. & Al. 709; and see *Collier v. Jones*, 1 H. & Br. 321, in which the Court of Queen's Bench recognised the distinction here contended for. In that case, a cause in *Dublin* having been made a *re-*

*manet* from the sittings after term, and no proceedings having been taken by the plaintiff for three terms afterwards, it was held, that the defendant was entitled to judgment as in case of a nonsuit.

Saturday, January 26th.

#### PRACTICE—JUDGMENT AS IN CASE OF A NONSUIT— RULE TO STAY PROCEEDINGS.

READ v. SHEW.

Motion to make absolute a conditional order for entering up judgment as in case of a nonsuit.

Issue was joined in Trinity Term, 1837. And on the 27th October following, notice of trial was served for the 4th of November then next, but, through some inadvertence on the part of the plaintiff, the record was not entered for trial. On the 6th November, 1837, the defendant entered a rule to stay proceedings until the plaintiff should pay the costs incurred in consequence of the notice of trial. No further steps had been since taken by the plaintiff.

On the part of the plaintiff, the application was opposed, on the ground of the rule to stop not having been vacated.

A rule to stay the plaintiff's proceedings, until he pay the costs of not proceeding to trial, pursuant to notice, must be vacated before the defendant can apply for judgment as in case of a nonsuit.

*Per Curiam*.—It is contrary to the practice to allow a defendant in



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such a case to apply for judgment as in case of a nonsuit, unless the rule to stay proceedings has been previously vacated.

Motion refused, with costs.\*

\* See the case of *M'Cammon v. Neeson*, 2 Hud. & Bro. 153, in which a similar order was made.—In computing the three terms, during which a cause must be at issue, before applying for judgment as in case of a non-suit, it is now fully settled, that the period during which a plaintiff has been prevented from going to trial, by a rule to

stop proceedings entered by a defendant, is not to be reckoned; but it is not necessary to wait three full terms after the vacating of the rule to stop, if any portion of the time had elapsed before the entry of the rule. In computing the three terms, the period during which a plaintiff has been tied up from proceeding is merely to be struck out.

## EASTER TERM.

Wednesday, April 17th.

## TITHE COMPOSITION—APLOTMENT.

ARMSTRONG v. KILLIKELLY.

A. and B., joint commissioners appointed under Goulburn's Act (4 G. 4, c. 99), duly made and lodged a certificate of composition, in 1831, but did not make any applotment thereon. A, having been subsequently appointed a

Action of debt for tithe composition, for the years 1832, 1833, 1834, and 1835, payable to the plaintiff, as Rector and Vicar of the parish of Moylough, in the county of Galway. At the trial, before the late Lord Chief Baron Joy, at the sittings after Hilary Term, 1837, a bill of exceptions was taken, by which the case appeared to be as follows:—The Register of the diocese of Tuam (in which the parish was situated), who attended as a witness on the part of the plaintiff, produced a certificate of composition for tithes in the parish of Moylough, signed by the Rev. John Orr and Daniel John Cruise, as commissioners, and bearing date the 15th of August, 1831. He also produced an applotment-book, purport-

sole commissioner, under Stanley's Act (2 & 3 W. 4, c. 119), adopted that certificate, and duly made and lodged an applotment in 1833, pursuant to the latter Act. B. afterwards affixed his signature, in the registry of the diocese, to the applotment made by A. alone, as sole commissioner.

*Held*, 1st. That A.'s applotment, as sole commissioner under Stanley's Act, was invalid and void; and that at the time of such appointment, and of his making the applotment as such sole commissioner, his authority as one of the joint commissioners originally appointed under Goulburn's Act was still subsisting and valid. 2dly. That the applotment made by A. as such sole commissioner, notwithstanding his intention to act in making it under Stanley's Act, must be taken to have been made by virtue of his valid authority under Goulburn's Act. 3dly. That B. had authority, by affixing his signature to the applotment made by A. alone, to adopt it as his own act, though he had taken no part in the actual duty of making it. 4thly. That the applotment having been once made, it became the only standard for measuring the amount of composition payable by the parties liable thereto, and had reference back to the period of making such composition. *Semble*, that until the making of the applotment, it was optional with the party entitled to the composition, but not imperative on him, to resort to the provisions of Goulburn's Act, regulating the payments of composition according to the grand jury cess.

ing to be made in pursuance of that composition. The applotment-book was signed by Daniel John Cruise, and the signature had the word "commisioner," in the singular number, after it, with the date of the 17th of February, 1834. The witness, on his cross-examination, deposed, that when this book was lodged in the registry, the name of Daniel John Cruise was the only name signed to it; and that, as well as he could recollect, the signature of the said John Orr was affixed to it some time in the beginning of the year 1836. The witness further stated, that he had attended and produced the said applotment-book, on some proceedings for the recovery of tithes, at the October Sessions of Galway, in 1835, and that Orr's name was not then to it, but was subsequently affixed by Orr, in the first week of January, 1836. A consent was then read in evidence, admitting that the defendant was owner in fee in possession of all the lands and premises in the declaration mentioned, during the period for which the plaintiff sought to recover. It was also admitted, that Orr and Cruise were duly appointed commissioners, pursuant to Goulburn's Act, and that Orr was the commissioner appointed by the Incumbent, and Cruise by the parishioners. The certificate and applotment were then read, whereby it appeared that the denominations of land in the defendant's possession were charged with the several sums in the declaration in that behalf stated.

The plaintiff having closed his case, the defendant produced Cruise, who swore that Orr and he had been appointed commissioners prior to 1831, and had signed a certificate, and lodged the same in the registry of the diocese in August, 1831; that they made no applotment together; that witness alone afterwards made an applotment; that he had, as an authority for so doing, a warrant as sole commissioner under Lord Stanley's act, bearing date the 26th of August, 1833; that he took the oath, in pursuance of his appointment, in 1833; that he was not assisted in making that applotment by any other commissioner; that he never saw Orr during the time of making it; that the applotment so made was signed by him on the 17th of February, 1834: that he lodged the copy of the applotment-book produced by the plaintiff (which he identified) in the registry of the diocese, immediately after signing it, and gave another copy to the Incumbent, and also lodged a third copy in the parish, as directed by the act; that the book produced had no signature but his own when lodged in the registry; that he alone had employed and paid the surveyor and other persons who assisted in making the applotment; that he alone furnished his account to the treasury, as sole commissioner, and was paid those expenses, and his own claim, as sole commissioner; that it was under his authority, as sole commissioner, in 1834, he had applotted.

The case having closed, the defendant's counsel called upon the learned Judge to direct the Jury, 1st, that the applotment made by Cruise

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alone, as sole commissioner, under 2 & 3 W. 4, c. 119, was not a valid applotment of the composition stated in the certificate made under the acts 4 G. 4, c. 99, and 5 G. 4, c. 63. 2d, that the applotment having been made, and lodged in the registry, by Cruise alone, could not afterwards be legally signed by Orr, so as to make it operate as the joint applotment of both commissioners. 3d, that the applotment having been made by Cruise alone, acting as such commissioner, was not afterwards made the joint applotment of both the commissioners, by the act of Orr, and could not now be used as a joint applotment. 4th, that even if it were a joint applotment, it could only regulate the payment of composition falling due after the book was signed and lodged, and could not be applied to fix the proportions for previous years, which must be regulated by the parish or grand jury cess. 5th, that plaintiff had not shewn any certain sum payable by the defendant; and that, for some or all of these reasons, the Judge should direct a verdict for the defendant. But the learned Judge refused so to direct the jury, or to leave any of the said questions to them, and declared his opinion, that Cruise and Orr, having been duly appointed commissioners by the vestry and Incumbent, and having entered upon that office, and signed a certificate of composition, the certificate was valid; and that the warrant of the Lord Lieutenant to Cruise was invalid and void; and that the acts of Cruise must be referred to his valid authority; that the applotment-book coming from the proper place, the registry of the diocese, where it had been deposited so long, without appeal, and appearing perfectly regular upon the face of it, must be considered to be valid; and told the jury, that if they believed the evidence, they ought, in his opinion, to find for the plaintiff. Whereupon the defendant's counsel excepted to the charge of the learned Judge. Verdict for the plaintiff.

Mr. *Close*, in support of the exceptions.—The composition, having been made under Goulburn's act, should have been applotted under that act, and not by the sole commissioner under Stanley's act. There is no provision in the latter act for making or completing an applotment under the former. Cruise, having acted by virtue of a warrant under Stanley's act, must be treated as an entire stranger. He took the oath under Stanley's act, and had no intention to applot, or carry into effect the composition made under Goulburn's act. He could not have acted alone under this act in case of the death, neglect, refusal, or incapacity of Orr, but another should have been appointed in the place of Orr, pursuant to the provisions of 4 G. 4, c. 99, sec. 15, and 5 G. 4, c. 63, sec. 12.

The COURT here intimated a wish to hear the plaintiff's counsel.

Mr. *T. B. C. Smith*, Q. C. (with whom was Mr. Serjeant *Greene*),

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for the plaintiff.—There is no controversy as to the fact of there being a valid certificate of composition under Goulburn's act; and it is admitted that the defendant was owner in fee in possession during the time for which the plaintiff seeks to recover in this action. The plaintiff is, therefore, unquestionably entitled to recover, and the defendant liable to pay *some* tithe composition; and the only question is, whether proper legal evidence has been given to ascertain the *quantum* of the defendant's liability. That depends on the validity of the applotment.—[PENNEFATHER, B. The certificate ascertains the defendant's liability to some composition, and the applotment ascertains the extent of that liability.]—Yes. First, the applotment is valid, so far as Cruise is concerned. If a person has two authorities, and does an act, that act will be referred to whichever authority will sustain it.—[PENNEFATHER, B. For instance, you may distrain for damage feasant, and avow for rent in arrear.]—The leading authority upon the subject is the case of *Grenville v. the College of Physicians* (a), the authority of which was recognised and adopted in *Crowther v. Ramsbottom* (b). It is not material, therefore, whether Cruise acted, or intended to act, under Goulburn's or Lord Stanley's act, if what has been done can be sustained under either. The 34th section of the 4 G. 4, c. 99, enacts, that before the expiration of four months from the making and signing of the certificate, the commissioners shall assess and applot. The applotment might, however, be made *after* the four months, and the statute is only *directory* as to the time, *Rex v. Mackay and Nash* (c). Indeed, the 40th section of that act, and the 19th section of the 5 G. 4, c. 63, clearly shew, that the statute is *directory* as to the four months, and that the applotment may be made afterwards. 2dly. The applotment is equally valid as to Orr. It is contended, that the applotting must have been the act of both commissioners; but it is to be observed, that, in this case, Cruise was the commissioner on behalf of the parish, 4 G. 4, c. 99, s. 12. He was the person in whom the parish confided.

The court are not to inquire whether the commissioners did their duty. If they did not, that would have been a ground of appeal. The objection, therefore, reduces itself to this, that the applotment was signed by one commissioner after it had been signed by the other. But such an objection is absurd. Are the two commissioners to sign at the same moment? Certainly not. Orr may have had a local knowledge, which satisfied him of the propriety of acquiescing in the applotment on the part of the clergyman. If a *mandamus* were now applied for against Orr and Cruise, they would have a complete answer, that they had applotted.

But it is objected, that Orr's signature not having been affixed to the

(a) 1 Lord Raym. 465; S. C. 12 Mod. 386.

(b) 1 T. R. 651. And see *Jones v. Atherton*, 1 Taunt. 53. (c) Smith & Bat. 239.

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applotment until after the commencement of the suit, it cannot be considered as valid in this action. The declaration in this case (which may be considered as the commencement of the action) was not filed until the 21st of January, 1836, previous to which, it appears from the evidence, Orr had signed the applotment. It may also be suggested, that there might have been an appeal, of which the defendant has been deprived. Now, in the first place, the trial did not take place until after Hilary Term, 1837; and if the applotment was valid, subject to appeal, two sessions had elapsed before the trial took place, and the time for appealing was therefore passed.—[PENNEFATHER, B. It is material to observe, that the time for appealing is limited from the *completion* of the applotment, and not from the time it is lodged.]—The very questions in this case have been already decided in favor of the plaintiff, by the Court of Common Pleas, although the case in that court was not so favorable for the plaintiff as it is here, inasmuch as the applotment there had not been signed by Orr when the action was commenced (a).

By the 5 G. 4, c. 63, s. 21, the applotment is made a record; and yet the learned Judge was required to leave it to the jury to contradict and invalidate a document which was of record, and perfectly good and valid on the face of it, in violation of the principle of law, that nothing can be averred which contradicts a record (b).

It is not disputed that the plaintiff, at the trial, was clearly entitled to recover, if he had proceeded under the 40th section of Goulburn's act, or the 19th section of the 5 G. 4, c. 63, according to the parish or grand jury cess, but, independently of the inconvenience which would arise from collecting the composition according to the parish or grand jury cess (c), the moment the applotment is made, the temporary mode pointed out by the 40th section of the 4 G. 4, c. 99, and the 19th of the 5 G. 4, c. 63 ceases.

Mr. Close and the Attorney General, *contra*.—The defendant's admission, that he was the owner in fee and occupier of the lands, in respect of which the plaintiff seeks to recover the tithe composition, is not an admission that those lands were chargeable with the composition.

It is clear from the 5 G. 4, c. 63, that it is only when the lands are sought to be charged by the applotment, that the defendant has a right to interfere; and it is open to him to say that Cruise was not the commissioner appointed on his behalf. The defendant was deprived of the right of appeal given by the 7 & 8 G. 4, c. 60, s. 1, the applotment having been made without notice, and the "cause of complaint" not having been known until after the time prescribed for appealing had elapsed.

(a) The case here alluded to is *Armstrong v. Brown*, for a report of which see Mr. O'Leary's useful and valuable work on *The Law of Rent Charges in lieu of Composition for Tithes in Ireland*, p. 316, note.

(b) Plowd. 492

(c) See O'Leary on the Law of Statutable Composition, p. 186.

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The applotment was not signed until January 1836, which was in fact after action brought. Moreover, the defendant was taken by surprise, Orr's signature having been secretly affixed to the applotment which had been produced at the October Sessions of 1835, without his signature. The applotment made by Cruise alone was a nullity.—

[PENNEFATHER, B. It was an imperfect act but not a nullity.]—The Court of Appeal must so have held it, until the second signature was affixed. There was no right of appeal until Orr had signed the applotment, *The King v. The Justices of Meath* (a). In that case a *mandamus* to hear an appeal was applied for, and it was held that the duplicate of the applotment not having been lodged in the registry of the diocese, the right of appeal was not mature. At the time this action was commenced, the period for appealing had elapsed.—[CHIEF BARON. Not if you reckon from the completion of the applotment.]

Again, there was no notice given to the parish, of Cruise acting as a sole commissioner, nor was any vestry held.—[PENNEFATHER, B. The acts do not require that notice should be given to the parishioners.]—Even so, it is submitted that the applotment having been made by Cruise alone, Orr could not after it was lodged legally affix his signature to it. He took no part in making it, and it was a record, 5 G. 4, c. 63, s. 21, which he could not tamper with or falsify. He had not fulfilled, in respect to it, the purposes for which he had been appointed, 4 G. 4, c. 99, ss. 12, 13, nor had he complied with the requisition of his oath, according to the directions contained in the 14th section of that statute.—

[CHIEF BARON. I doubt exceedingly, even if it had been proved at the trial, that the conduct of the commissioners in making the applotment had been irregular or illegal, the defendant could have availed himself of any misconduct on their part, to invalidate the applotment. If the commissioners had been guilty of any impropriety, they might perhaps have been liable to an indictment for a misdemeanor, or there might have been some other mode of obtaining redress, but I question very much whether in an action brought by the tithe-owner against the tithe payer, it would be open to the latter to say, that the commissioners had acted irregularly, or in a manner not in accordance with the act of parliament.]

As to the argument, that the enactment is but directory, the statute must be construed so as that a party shall not be prejudiced by any neglect of ministerial duty on the part of a public officer, but here, the plaintiff had it in his power to compel Orr to complete the applotment. There is nothing in this case to take it out of the general rule, that the directions of a statute must be complied with, *Jones d. Humphrys v. Byrne* (b). To the same effect is

(a) 1 H. &amp; B. 425.

(b) 1 H. &amp; B. 26.

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*Stubber v. Trench* (a). The latter case is identical in principle with the present. Here, the statute imposed on the commissioners the obligation of doing these several acts *jointly*, and the court cannot dispense with that obligation. The directions in these acts are easy of observance, and there is no reason why they should not be followed, *M'Loughlin v. Galbraith* (b). The general rule of construction is, that where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*, *The King and Queen v. Barlow* (c). Besides, the plaintiff will sustain no injustice, if this applotment be held void, as a valid one can now be made, and the commissioners are compellable to make it, *The King v. Mackay and Nash* (d). It has been argued that the tithe-composition, which is a charge both upon the lands and upon the persons of the tithe-payers, is to have relation back from the time it was completed, to the time it was originally made; but from the intervening alterations in the value of lands, such a retrospective operation would be most unjust. The value of the lands might, in the interim, have been either increased or diminished; in the one event, the clergyman would get much more, and, in the other, much less than he was justly entitled to. It has been contended also, that Cruise having had a valid authority to make an applotment under Goulburn's act, his applotment is to be referred to that authority; but he had no authority to act or make the applotment by *himself*, and his *sole* act cannot therefore be referred to that *joint* authority.

THE CHIEF BARON.—With regard to the first question, whether there was a valid applotment or not? The court is of opinion that there was. With respect to Cruise, it conceives that although he intended to make the applotment under Lord Stanley's act, yet, having a valid authority to make an applotment under Goulburn's act, he must be taken to have performed that function by virtue of the authority with which he was in reality invested. With respect to Orr, the other commissioner, it appears that he afterwards signed the applotment, and so far as he had authority to make it his own act, he did so, but it has been objected that he made the applotment at a period subsequent to that at which it ought to have been made; the court, however, is of opinion that the act does not require that it should be made within any definite period of time. There being thus a valid applotment, the only remaining question is as to the time when it should take effect. It has been argued that the applotment is the standard whereby all existing liabilities are to be measured, and of that opinion is the court. The defendant having been liable to the payment of the composition, we think

(a) 1 H. & B. 146. See also *The King v. The Justices of Leicester*, 7 B. & Cr. 6; *Lessee of the Governors of St. Patrick's Hospital v. Dowling*, Batty 393; and *The King v. The Inhabitants of Westbrook*, 4 B. & C. 752.

(b) 2 H. & B. 533.

(c) Salk 619.

(d) S. & B. 26.

it was optional with the plaintiff before the applotment was made, to proceed against him under the clauses of the act which have been referred to, in reference to the Grand Jury cess, but, although it was *optional* with the Incumbent to resort to those provisions of the act for the recovery of the composition, we do not think it was *imperative* on him to do so. It is not necessary to decide the question in the present case, but our impression is, as I have stated, that the 40th section of the act (*a*) does give that option to the incumbent before an applotment is made, but when once there is an applotment, it becomes the sole standard of liability.

PENNEFATHER, B.—I quite concur in the grounds of my LORD CHIEF BARON's opinion.—After the decision in the Common Pleas, we should feel much reluctance in differing in opinion with that court; but even if the case were *res integra*, we should, for the reasons already stated, have arrived at the same conclusion.

Exceptions overruled.

(a) 4 Geo. 4, c. 99.

*Tuesday, May 14th.*

# PRACTICE—BAIL—CO-PARTNERS—DEFENDANT OUT OF JURISDICTION—NOTICE OF BAIL.

Assignees of WILLIAMS v. J. and M. ANSELL.

M. Ansell, one of the defendants, being in custody, bail was offered for him.

It appeared that the defendants were co-partners in trade, and sued as the joint drawers of a bill of exchange; that they both resided out of the jurisdiction of the court, and that the defendant in custody had been arrested while passing through this city.

Mr. *J. D. Fitzgerald*, on the part of the plaintiffs, opposed the bail, and, first, called upon the court, to refuse bail for the one defendant unless an appearance was at the same time entered for the other. It is the practice of this court, to require the partner in custody to appear for his co-partner before he is admitted to bail, and if it were otherwise, great injustice would be the consequence, for there is no other mode of bringing the co-defendant before the court. The court of Queen's Bench, in a case precisely similar in its circumstances to the present, said, that the practice there was "not to permit the bail piece to be received or acted upon, until an appearance for the co-defendant, which is in effect the same thing" (*a*). It is said in *Stewart's Practice*, p. 120, that the practice of this court is to refuse the bail until an appearance is entered for the co-defendant. The defendant in this case, some days since, obtained a rule upon the plaintiff to declare, and the court

ners, this court will not refuse to receive bail for a defendant in custody an appearance for his co-defendant out of the jurisdiction.

(a) *Everard v. Curwen and others*, 2 Law Rec. N. S. 27.

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A notice of bail, describing the bail as of "S. A. Street, Druggist," where it appeared that he resided in S. A. Street, but carried on business in a different place—held sufficient.

A person tendered as bail, who swore that he was worth double what he owed but admitted that he had recently permitted bills of his to be protested without being able to account satisfactorily for having done so—rejected.

*Semble*, that in an action against part—until he enters



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discharged the rule; the defendant refusing to appear for his partner.— [PENNEFATHER, B. The court will give the plaintiffs time to declare, so as to prevent the defendants taking any advantage of them in that respect, but I doubt whether it can refuse bail for one defendant, until he appears for his co-defendant out of the jurisdiction. If the court were to go that length, it would be, in fact, to keep a party in custody, who is willing to give bail under the statute. It is quite a different thing where the defendant obtains a rule upon the plaintiff to declare. What authority has the defendant in custody to appear for his co-defendant?] The defendants are co-partners, and sued as the joint drawers of a bill of exchange, when they have put themselves forward to the world in that character, they are bound each for the acts of the other, and one partner may appoint an attorney to act for the firm. It is the every-day practice in the Court of Bankruptcy for one member of a co-partnership to empower (by letter of attorney) a person to act for the firm. If the court admits the defendant to bail, the plaintiffs are without remedy: for it has been decided that the court will not substitute service of process upon one partner for another, *Grant v. Proser* (a); and, in that case, the court observed, that if one partner in custody apply for the usual rule to declare, the court will put him under terms of entering an appearance for his co-partner. If the defendant in custody will admit his handwriting, and undertake not to plead in abatement, we are willing to declare against him alone.

The defendant having refused this offer, the court desired counsel to proceed with the examination of the bail, reserving the other question. The person who was tendered as bail being examined, stated that he lived in S. A.-street, but carried on trade in C.-place as a wholesale druggist; that he was worth double what he owed; but, on further examination, he admitted that he had recently allowed bills of his to be protested for non-payment, adding, that they had since been taken up, and that it was his partner who had let them be protested in his absence from town. He acknowledged, however, that he did not know how many bills had been so protested, nor what was the amount thereof.

Mr. *Fitzgerald*.—This bail must be refused: first, the notice is defective. The notice describes the bail as of "S. A.-street, wholesale druggist;" but, upon his examination, it appears that he *resides* in S. A.-street, but *carries on business* in C.-place. 2d. Where a person tendered as bail admits that he has allowed bills to be protested, it is a fatal objection.

PENNEFATHER, B.—I think the notice sufficiently describes the bail; but I do not think that a person is eligible as bail, who admits that he has suffered his bills to be protested, but cannot explain why, and who does not even know the number or amount of them.

Bail disallowed, with costs.

(a) *Smith & Batty*, 9C.

## EXCHEQUER.

*Tuesday, May 21st, 1839.*

## REGISTRY APPEALS.

BEFORE THE LORD CHIEF BARON.

In re RAFFERTY.

The claimant having given notice to register anew, at the city of Dublin February Sessions, pursuant to the 27th section of the Reform Act, did not appear in the court below, but authorised an agent to demand and receive his new certificate. The original certificate was not produced, nor was any evidence given of its loss; but the Town Clerk produced the original affidavit of registry made in 1832, with the entry of the certificate thereon. He claimed as a £10 leaseholder, in respect of houses in Shelbourne-place. The Registering Barrister, Mr. Dobbs, thinking that the original certificate ought to be produced, to enable a claimant to avail himself of the summary process mentioned in the 27th section, rejected his claim.

A party seeking to register anew, under the 27th sect. of the Reform Act, ought to give in evidence the original certificate. It is not enough to refer to the original affidavit.

Mr. Seton and Mr. R. O'Connell contended, that the 22d section ought to be incorporated with the 27th; and that, by the general words used in this latter section,\* the privilege of referring to the affidavit, which, by the 22d section, was given to a person registered under the 10 G. 4, c. 8, to obtain a certificate under the 2 & 3 W. 4, c. 88, was also given to a party seeking to renew the registry already had under this latter act. The language used by the Lord Chief Baron, in giving judgment in *In re Seton (a)* was referred to in support of the position.

(a) Ante, p. 124.

\* The words are—"And thereupon the same proceedings shall and may be had, the like orders made, the like oaths taken, the like certificates granted, the like rights and powers of appeal enjoyed and exercised, and the like

"rules and regulations, enactments and things, observed, performed, and followed, as if such application had been made at the first session for registering votes directed to be held under this act."

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The original certificate was confessedly sufficient ; why, then, should not the affidavit, which is the record from which that is taken ?

Mr. *Hayes*, and Mr. *Butt*, against the claim, were not called on.

WOLFE, C. B.—I certainly did make use of the language attributed to me in the report of that case ; but, upon looking carefully at the act, I cannot but think that the legislature may have had a design in wording the sections differently. In the 22d section, the liberty of referring to the affidavit is expressly given, while in the 27th section, it appears to be cautiously avoided. The legislature may have thought there would be danger in letting two certificates remain in existence, which might be used for fraudulent purposes. With respect to the certificate granted under the 10 G. 4, it was a matter of indifference what became of it. Immediately on the passing of the Reform Act, that certificate became useless for any purpose whatever, except entitling the party to be registered under the Reform Act, unless cause. But not so with the certificate under the Reform Act. If allowed to remain in full force in the party's possession after a new certificate granted, the door might be opened to much fraud. Upon the whole, the legislature having made a difference between the wording of these two sections, I cannot hold the difference immaterial, and must, therefore, confirm the order of rejection.

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At the close of the discussion on a previous case of *re-registry*, Mr. *Hayes* intimated to the court the practice adopted by several Registering Barristers, of indorsing the old certificate, before returning it to the claimant, with the words, " New certificate, granted at — Sessions, 183—," and signed by the Clerk of the Peace. His Lordship expressed his approbation of this practice, as well calculated to prevent improper use being made of the old certificate.

Mr. *R. O'Connell* then asked, whether the ground of the decision was, that the loss of the original certificate had not been proved ?

WOLFE, C. B.—That proof has not been made in this case ; and I do not say my decision would have been different if it had.

## In re SAVAGE.

The claimant sought to be registered anew, as a £10 leaseholder, at the last February Sessions for the city of Dublin. His notice, which was produced to the court, having been referred to in the order of rejection, described his premises as of "Upper or Lower North Cumberland-street." The order of rejection having stated the party's right of claim, and referred to his notice, proceeded to state the production of the original certificate of 1832, by an agent duly authorised by the claimant, but altogether ignorant of the continuance of qualification in his principal. The order concluded by declaring that the claim was rejected, without assigning any reason or grounds for the rejection.

The order of rejection of a claim to register, when not grounded on insufficiency of value, ought to state all the reasons which have influenced the court below in making it, and also so much of the facts of the case as bear upon those reasons.

Mr. *Hayes*, against the claim.—The order of rejection is quite informal. It assigns no reason for the rejection, as required by the 21st section of the Reform Act; and as, by the 25th section, it is only upon the sufficiency or insufficiency of the reason assigned that the appellate court is to decide, it is plain that no jurisdiction whatever can be exercised, and the decision below must stand. The court below ought to have certified all its reasons. (a).

A notice, giving the description of the premises as in "Upper or Lower C.-street," held insufficient.

WOLFE, C. B.—I agree with you, that the order of rejection has been informally drawn up. It is the duty of the court below to state all the reasons which have influenced it in coming to its decision, in order that the court may judge of their sufficiency. And it should also state so much of the facts of the case as bear upon the reasons assigned. It would be too hard, however, for me to turn this party round upon a matter over which he had no control. The strong reason, which appears to me to have operated on the mind of the court below, though not formally assigned as such, is, that the claimant did not appear in person, and take a new affidavit. Now, having already made up my mind on that point, as raised in *Mc Cleland's Case* (b), a case which was ably argued on both sides, and to which I gave a great deal of consideration, I shall have no hesitation in reversing the order of rejection.

Mr. *Hayes* admitted that the question alluded to must be considered as ruled by *Mc Cleland's Case*; but urged, that inasmuch as no reason whatever was assigned on the face of the order, it was open to him, at all events, to collect, from the facts stated in it, any circumstance which would support the decision of the court below. The notice referred to in the order must be taken as if incorporated with it, and set out on the face of it. From that notice, it appears that the party has not accu-

(a) Cr. Dix. 312.

(b) Ante, p. 137.

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rately described the situation of the premises which constitute his claim, and with which he must have been conversant. The very point has been decided in this court, in *In re Finlay (a)*.

Mr. *Seton* and Mr. *R. O'Connell*, *contra*, insisted that the objection to the notice was a preliminary one; that it had not been taken in the court below, and that the only question intended to be reserved was, as to the necessity of the claimant's appearing in person, and taking the affidavit.

WOULFE, C. B.—I think that very likely; but I cannot go beyond the record before me, to inquire into what took place below. Neither can I prevent the opponents of the claim from discussing any point that fairly arises on this record. I beg it now distinctly to be understood, that in all future cases, I shall confine myself strictly to the grounds assigned by the court below, and to pronouncing upon their legality. I do not think it fair to this court, that a number of facts are to be stated for it, and that it should be left to decide all the possible questions which may be raised on such facts. In the present case I do not wish to take either party by surprise, and shall therefore submit to the hardship imposed on me. I see then from the record, that a cause did exist, which should have induced the Barrister to reject the claim, and how can I, with that staring me in the face, permit this person improperly to be registered, and thus do a very serious injury to the constituency?

Rejection affirmed.

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*In re* GORMAN.

A salaried clerk occupying a house in such capacity is not entitled to register thereout as a householder.

The claimant, a householder, was rejected at the city of Dublin Registry Sessions for May, 1839, on the ground of his not being in occupation "as tenant or owner" within the meaning of the 5th section of the Reform Act. The claimant resided for the last four years in a house in *Walling-street*, which was connected with the brewery of Messrs. D. O'Connell, and Co. He was a clerk in that brewery, and resided in the house as such clerk. He paid no rent for it; but it was worth £10 a year. He had an annual salary, and if he had not the house, would have had an increased salary. He occupied the house as part of his salary. The outer door opened into *Walling-street*.

Mr. *Seton* and Mr. *R. O'Connell* contended, that the occupation of the house in lieu of salary, was equivalent to receiving an increased salary,

(a) *Ante*, p. 137.

taking the house from the Messrs. O'Connell as landlord, and paying them back the increase of salary in the shape of rent. That thus the relation of landlord and tenant would subsist between the parties, which could not be dissolved by the landlord without the aid of an ejectment.

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*Mr. Hayes, contra.*—There is no pretence for saying the claimant is owner in fee, and upon the authority of decided cases, it is manifest that the relation of landlord and tenant does not subsist, *Bertie v. Beaumont* (a); *Rex. v. Cheshunt* (b).

*Woulfe, C. B.*—I am of opinion that no tenancy exists here. The claimant is the mere servant of the brewery company, occupying this house as their servant, and by their permission. He could be dispossessed of the house at a moment's notice, if dismissed from the employment for misconduct. It is quite analogous to the case of a porter occupying a lodge at a gentleman's gate, or of a coachman occupying apartments contiguous to the stable. It is clear that an ejectment would not be required to dispossess them.

Rejection affirmed.

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In re DALY.

Michael Daly, Old Church-street, grocer, having applied at the city of Dublin Registry Sessions for February last, to be registered as a householder, was rejected on the ground of joint occupancy. The facts appeared to be as follows:—Claimant lived nearly nine months in the house, which had been previously held by his brother, who died in it intestate. Claimant continued to hold his deceased brother's lease, and took out letters of administration to him. He paid half a year's rent since his brother's death, and got a receipt from the landlord as "Received from the representatives, &c." His annual rent was £57. 15s. 0d. which he paid out of his own funds. The stock in the shop was bought with his money. His sister, who lived with the intestate during his life, continued to live with the claimant since his decease. He never paid his sister any wages, but supported and clothed her. She was twenty-one years of age. The intestate left brothers and sisters, but no children.

An administrator and one other of the next of kin lived in the house of the intestate. The administrator was allowed to register as a householder, it not clearly appearing that the occupation of the next of kin was in respect of his distributive share, so as to make it a joint occupancy.

*Mr. Hayes*, in opposition to the claim was called on; and contended,

(a) 16 East. 33. (b) 1 B. & Ald. 473. See also *Stock's Case*, Russ. & Ry. 185; 2 Taunt. 339.

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that the effect of the evidence was simply this ; that the sister occupied the house as a part of her distributive share of the assets. That the claimant could have no right, under the Reform Act, to register as a householder, in respect of premises of which he had taken and kept possession only as administrator. It is therefore fairly to be inferred, that the claimant and his sister entered and enjoyed, as next of kin of the intestate, each having equal rights. He cited 2 *Williams's Executors*, 848, and *Grice v. Grice*, cited in *Burr. Settl. Ca. 446*.

WOLFE, C. B.—I do not think it has been clearly made out that the sister entered and occupied as one of the next of kin. She lived in the house before the intestate's death, and continued in the same way after it. The claimant swears that he alone is responsible for the rent, and that he has paid it out of his own funds. He has also purchased the whole stock of the shop ; so that it does not occur to me, that the sister lays any claim to occupation of the house as one of the next of kin. I must therefore admit the claimant.

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IN re HALL.

Where a party having served notice of registry as a freeman, changed his residence, he need not serve a new notice, although sufficient time for so doing may intervene before the last day for serving notices.

On the 6th of January last, while the claimant was residing on Bachelors's walk, he gave notice of registry at the then ensuing February Sessions for the city of Dublin, as a resident freeman. The last day for serving notices for that Session, within the 15th section of the Reform Act, was the 16th of January. Between the 6th of January and the 16th of January, the claimant removed to another part of the city, but gave no notice of claim from his new residence. He was therefore rejected.

Mr. *Hayes* for the appellant.—The act requires that the notice shall be one of "twenty clear days at the least," and if a notice longer than twenty days be sufficient, then no objection can be raised to it, because the place of residence which the party occupied at the time was truly stated in it.

WOLFE, C. B.—I think not. The statement of residence is required by the act, for the purpose of identifying the claimant : that can be done as well by shewing his residence thirty days before the Session commenced as twenty. If the party had served a twenty-day notice, and then changed his residence, the objection would not have been listened to : and why should it, in the one case rather than in the other ?

Claimant admitted.

## QUEEN'S BENCH.

Monday, 22d April 1839.

## LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT—EQUITABLE AGREEMENT.


Lessee of THOMPSON v. ANDREWS.

**EJECTMENT** on the title. This case came on for trial at the last Assizes for the county of Antrim, before BURTON, J., when the plaintiff gave in evidence articles of agreement under seal, between the plaintiff and defendant, bearing date the 15th day of October, 1832, whereby the plaintiff agreed to execute a lease of the premises for which the ejectment was brought, to the defendant, for the term of six years, from the 1st day of January then next, at the yearly rent of £150, to be paid yearly; with liberty to the said defendant to determine, &c. the said lease and agreement, and relinquish the said premises on the 1st day of January, 1834, on giving to the plaintiff three months' previous notice in writing; and also with liberty to surrender said premises on the 1st day of January, 1838, on giving to the said plaintiff six months' previous notice in writing; and the agreement then provided that, in case the said defendant should *intend giving up possession of* said premises on the 1st of January, 1839, he was to give the said plaintiff *six months' previous notice in writing*, and that there should be contained in the lease to be granted, as therein aforesaid, a proviso or provisos to that effect. There was then a *toties quoties* covenant for renewal, at the same rent and for such term as might be agreed on, same not to be less at any one time than six years. The plaintiff, having also proved payment of rent by the defendant, and a demand of possession after the 1st, and before the 7th day of January, 1839, the latter being the day of the demise in the ejectment, closed his case. The defendant called upon the learned Judge to non-suit the plaintiff, on the ground that the defendant was entitled to a notice to quit, which the learned Judge declined to do, but took a note of the objection, reserving liberty to the defendant's counsel to move to set aside the verdict, and have a verdict entered for the defendant, if the court should be of opinion that the Judge should have so directed the jury, and subject to this objection the jury found for the plaintiff.

A rule *nisi* had been obtained for this purpose on a former day, against which

Where in an ejectment on the title an agreement was given in evidence, whereby the defendant agreed to hold the premises for six years, which had just expired when the ejectment was brought, and by which he was to have the option of renewing for six years longer, and was bound to give six months' previous notice, if he intended to give up possession at the termination of the first six years, which it appeared he did not give;—*Held*, that the defendant was not entitled to a notice to quit.



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Mr. *Gilmore*, Q. C., with whom was was Mr. *Napier*, now shewed cause. It is not necessary to argue, whether the defendant held under an agreement or a demise, as the time for which the lease was to be granted had expired, and notice to quit is not necessary where the plaintiff brings his ejectment at the expiration of the term contracted for, *Doe d. Tilt v. Stratton* (a).—[BURTON, J. Mr. Holmes, on obtaining the conditional order, relied upon a clause giving the defendant a right to renew the term.]—The concluding paragraph of the clause requiring six months' notice previous to January, 1839, makes it imperative on the defendant to give notice; and the reason is obvious, that the plaintiff might or might not renew with his landlord; if the defendant continued his tenant, he might or might not renew with his landlord, and this is the obvious reason why a notice should be given. It is not to be implied that plaintiff was to give a similar notice; he was bound to give the option to the defendant, it was entirely with him, and he should give notice of the way he elected. The plaintiff had no option, he could make no election, and therefore there was nothing of which he could have given notice. There is nothing to distinguish this case from the case of *Doe d. Tilt v. Stratton*; on the contrary, where a notice is stipulated for, from one party and not from the other *expressio unius est exclusio alterius*. Where a tenant holds under an agreement for a lease, he will be deemed to hold subject to all the terms and conditions, which it was intended should form part of the lease, *Doe d. Bromfield v. Smith* (b); *Doe d. Oldershaw v. Breach* (c).

Messrs. *Holmes* and *Tomb*, *contra*.—If defendant held under an equitable contract, he was clearly entitled to a notice to quit. The case of *Doe d. Tilt v. Stratton* was where the lessor agreed to grant for seven years to commence on the 29th of September, 1820, it was not executed, but the defendant occupied and paid rent under it, and thus created a tenancy from year to year, but only for the seven years; and the contract therefore notified that the tenant should go out of possession at the end of the seven years, and upon an ejectment brought after a demand of possession, on the 29th of September, 1827; on these grounds the court held that the tenant was not entitled to a notice to quit. Best, C.J. in that case says, "within the seven years the defendant could not have been turned out without notice, but at the end of the seven years the contract itself gives sufficient notice." It is there admitted that the tenant, during the term, could not be turned out without a notice to quit; and if in this case the contract did not determine when the ejectment was brought, we were entitled to a notice to quit, as much as the tenant would have been entitled to such notice in the case just cited, during the seven years.

(a) 4 Bing. 446, S. C.; 1 Moo. & P. 183.

(b) 6 East. 529.

(c) 6 Esp. 106.

Barrough, J., says, "during these even years notice would have been necessary, but not at the end of that period." The cases of *Doe d. Bromfield v. Smith*, and *Doe d. Oldershaw* decide this, that a person who is in possession, and pays rent under an equitable article, cannot be turned out during the term in it, without a notice to quit, when it specifies exactly the term, and are so far authorities with the defendant. Andrews was bound to give six months' notice, if he intended to give up the premises, and not having done so, it must be intended, that he meant to continue for the ensuing six years, and Thompson could compel him to renew for that period; the interest was therefore not determined, and Andrews was entitled to notice. In *Walker v. Byrne* (a), it was contended that a lessee of a lease of lives which contained a covenant for perpetual renewal, even where no rent was paid after the fall of the lives, was entitled to a notice to quit, but it became unnecessary to decide that point, the plaintiff having been non-suited, no demand of possession having been proved.

The COURT did not call upon Mr. Napier, but allowed the cause shewn, upon the grounds stated in the argument.

Rule discharged.

(a) 3 Law Rec., N. S. 68.

Friday, April 26th.

## WILL—CONSTRUCTION OF—TENANCY IN COMMON, AND JOINT TENANCY.

Lessee of SCULLY v. O'BRIEN.

EJECTMENT on the title. This case was tried before BUSHE, C. J., at the last Assizes for the county of Tipperary held at Nenagh, when the following statement of facts was made by the plaintiff's counsel, and admitted by the counsel for the defendant. That the ejectment was brought for the recovery of a moiety of the lands of Skehana and Butler's Lodge. Skehana was held under a lease of lives from the Goold family. George Goold being seized in fee in 1790, by deed leased for lives to Richard Butler. In 1788, Sir John Carden seized in fee of Butler's Lodge, by deed demised to Thomas Looby for three lives; the interest in Looby became vested in Richard Butler in 1798. In 1799, R. Butler duly made his will, whereby he devised, amongst others, the

"them, and in case the three should die," then to any other child his said sister should have; and then bequeathed the above properties to the issue of his daughter, "and in case she has more than one child, to go share and share among them, and in case all her issue should die, the said properties to revert as above between" his nieces; Held, that the nieces took under this will as tenants in common, and not as joint-tenants.

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Where the testator devised all his properties to his daughter for her life, "and in case she died without issue," then to his three nieces, daughters of his sister, "and in case any of them should die, the said properties to revert to the survivors or survivor of

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lands for which this ejectment was brought, to his daughter Elizabeth Butler, during her natural life, and then adds "in case my daughter Elizabeth dies without issue, I will the above mentioned properties bequeathed to her, to my three nieces, Mary, Eleanor and Elizabeth Burke, daughters of my sister Mary Butler and John Burke, and in case any of them should die, the said properties to revert to the survivors or survivor of them; and in case the three should die, I bequeath the said properties to any other child my said sister Mary and husband shall hereafter have." Then, after giving some pecuniary legacies, the testator proceeded, "I bequeath my above-mentioned properties to the issue of my daughter Elizabeth, and in case she has more than one child, to go share and share among them, and in case all her issue should die, the said properties to revert as above, between Mary, Eleanor and Elizabeth Burke." The testator died soon after, leaving his wife and one daughter surviving him; his daughter died a minor, without issue, unmarried, and intestate. The nieces entered into possession; the eldest, Mary, married William Ryan, and died in June 1815, without issue; the estate then devolved upon Eleanor, the second daughter, and Elizabeth. Eleanor married Darby Scully, and died in 1818, leaving a son, Jeremiah Scully the plaintiff, who attained his age in 1837. Elizabeth married the present defendant, and she, upon the death of her two sisters entered into possession of the whole of the lands, and so remained in possession until her marriage with this present defendant in 1835. The sole question in the case was upon the construction of the above will, and whether under it the three nieces took as joint-tenants, or as tenants in common. And subject to this question which the learned Judge reserved, a verdict was taken for the defendant, with liberty to the plaintiff to move to have it changed into a verdict for him, if the court should be of opinion that the nieces took as tenants in common.

A rule *nisi* had been obtained for this purpose on a former day; against which

Mr. *Smith*, Q. C., with whom were Messrs. *Hatchell*, Q. C., and *Fogarty*, Q. C., now shewed cause. The question is, whether the devise to the nieces created an estate in joint-tenancy, or a tenancy in common? There is no word in the early part of the will upon which the plaintiff can raise any argument. No such expression as "share and share alike," or, "to be equally divided," &c. The word "property" carries the absolute interest in the freehold estates, and there is not a word about issue; but, that in case any of the three devisees should die, the said properties to revert to the survivors or survivor; the very words used in giving a joint-tenancy. In *Tuckerman v. Jefferies* (a),

(a) 3 Bac. Ab. 6th Ed. 681, S. C. 11 Mod. 108, Holt. 370.

notwithstanding the words "to be equally divided between them," the devisees were held to be joint tenants; and in *Armstrong v. Eldrige* (a), the same was held, although the words "equally between them, share and share alike," occur in the will. In the present case there are no words stronger than these; and these cases are recognised in 2 *Powell on Devises* 755. The court will not hold that the words "as above" refer to the next preceding clause, but to the clause which contains the devise to the three nieces; unless the plaintiff shews the devise created a tenancy in common in *quasi fee* he is out of court.

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Messrs. *Moore*, Q. C., and *Brewster*, Q. C., with whom was Mr. *Hobart*, *contra*.—It is clear from the whole of the will, what the manifest intention of the testator was. It is quite plain that he preferred the children of Elizabeth to his three nieces, and to them it is not disputed that he gave the property as tenants in common. The leaning of the courts is to give a construction which will create a tenancy in common, instead of a joint-tenancy, and the words in the last clause "in case all her issue should die, the said properties to revert as above *between*" the nieces, are sufficient to create a tenancy in common. The word "between" is sufficient to give a tenancy in common, *Lashbrook v. Cock* (b); and therefore, even although the former words in the will give a joint-tenancy, these give a tenancy in common, and the latter words must prevail. If the words "as above" refer to the early clause, the word "between" must be held to refer to the same, and then that clause will give a tenancy in common; but if the words "as above" refer to the last antecedent clause, they are decisive on the question, for after the life estate to Elizabeth, gives the estate to her children if she have any, as tenants in common; and if no children, then to the nieces "as above;" that is, as tenants in common. The words "in case any of them should die," have been the subject of several judicial decisions, and have been held to refer to dying in the lifetime of the testator; and in *Trotter v. Williams* (c), where there was a bequest to legatees, and if any happen to die, then her legacy to such as should be then living, it was held that the death of any of the legatees, after the death of the testator, would not carry the bequest to the survivors.

It is now settled, that the words survivor or survivors, mean other or others, 2 *Powell on Devises*, 723, 724. In *Cripps v. Wolcott* (d) it was held that words of survivorship are to be referred to the period of division and enjoyment. To what period the words "in case of the death" are referable is very fully considered in 2 *Powell on Devises*, 758.


As to words of survivorship, there is an express authority that they shall not defeat the effect of words importing a tenancy in common, but

(a) B. C. C. 215.

(c) *Prac.* in Chan. 78.

(b) 2 Mer. 70.

(d) 4 Mad. 11.

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they shall be referred to some time, as the death of the tenant for life or even to the death of the testator, though a construction not to be adopted if there can be any other, *Russell v. Long* (a).

Mr. *Hutchell*, Q. C., replied.—If there be nothing in the will to alter the first disposition of the property to the nieces, it is clear they took as joint-tenants. Then as to the words “between them,” they cannot alter the joint-tenancy before created; the testator’s using an ambiguous word will not alter a plain disposition of his property previously made. It is manifest the testator knew what words to use, when he wished to create a tenancy in common, and these he uses when speaking of his grand-children, but never when speaking of his nieces. In *Armstrong v. Eldridge* (b), Holt, C. J., said, “that though the words “equally to be divided, and share and share alike, were in general construed to create a tenancy in common; yet, when the context shews a “joint-tenancy to be intended, the words should be construed accordingly:” and so they were in that case. And in *Turkerman v. Jeoffrys* (c), Holt, C. J., says “unless the words ‘equally to be divided’ necessarily imply a tenancy in common, they are not to be so interpreted.” The same principle was recognised in *Doe d. Calkin v. Tomkinson* (d). The rule as to last words in a will cannot apply to the word “between” in the present case, because the words “as above” give to this word the effect it would have had, if it stood in the clause to which the words “as above” refer.

Mr. *Fogarty*, Q. C., referred to *Doe d. Boswell v. Abey* (e); *Barker v. Gyles* (f); *Boons v. Allen* (g).

Mr. *Hobart* also referred to *Wright v. Stephens* (h).

*Wednesday, May 8th.*

BUSHE, C. J., after stating that there was no controversy about the facts in this case, but that by consent of the parties the question came before the court, whether upon the construction of Richard Butler’s will his three nieces took thereunder his estate as joint-tenants or as tenants in common? The clauses of the will which refer to the devises of the freehold estate are dispersed over the entire instrument. There is no express quantity of land given in any part of the will, but the word properties is used throughout; neither is there any estate in joint-tenancy or in tenancy in common, expressly given therein. He gives his proper-

(a) 4 Ves. 551.

(c) Holt. 370.

(e) 1 M. & Sel. 428.

(g) 1 Bro. C. C. 180.

(b) 3 Bro. C. C. 215.

(d) 2 M. & Sel. 165.

(f) 3 Bro. P. C. 104.

(h) 4 B. & Al. 574.

ties to his daughter expressly as tenant for life, and adds, in case she die without issue, that in that event they were to go over to his three nieces, or to the survivors or survivor of them; and in case they should all die, he devised his properties to any other child his sister and her husband should have. He then devises the property to the issue of his daughter, and makes it quite apparent the estate which they are to take, namely, as tenants in common after the life estate to his daughter; and he adds, in case all her issue should die, then the properties to revert as above, between his nieces. Now, these two expressions must be taken to mean the same thing, and that the nieces were to take estates similar to his grand-children, namely, as tenants in common. The words where he first devises to his nieces, are strongly indicative of an intention to give these estates to the nieces, or to any of them who should be living at the death of his daughter without issue.

Postea to the plaintiff.

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*Monday, April 22*

#### PRACTICE—SERVICE OF SUMMONS IN EJECTMENT.

*Lessee of the Earl of DERBY v. the casual Ejector.*

Mr. WALL applied for an order to substitute service of the summons in ejectment in this case, or that the service already had might be deemed good service. The affidavit of the plaintiff's attorney stated, that some years since, a lease of the lands in question was made to one Price, since deceased; that upon a search being made in the registry, a settlement was found, whereby these lands were vested in trustees for one Ryan Brennan, who for some time paid the rent, and had since gone to America; that one Minchin received the rents of the lands, and that one Roache received rents of other lands belonging to the said Ryan Brennan, that there was no dwelling house on the lands except those belonging to tenants, all of whom had been served. The process-server's affidavit deposed to having served copies of the ejectment upon the aforesaid Minchin and Roache, and that he had also posted same on a lime-kiln, being the most conspicuous place on the premises.

Where a party cannot be served with the summons in ejectment, the court will, upon a proper affidavit, deem service by posting, &c., good service; but it will not make an order to substitute service in ejectment cases.

CRAMPTON, J., said, that as the practice upon motions of this kind was somewhat unsettled, he would consult with his brethren as to what order should in future be made.

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*Wednesday, April 24th.*

CRAMPTON, J., stated, that as there had been, on some occasions, an alteration in the practice of this court, as to the order made in cases of this kind, he had declined deciding this case when first mentioned; that since then, he had consulted the officers of the court, who had suggested some technical difficulties in the order to substitute service in ejectment cases, and he had also learned, that the practice of the Court of Exchequer is, to make an order that the service already had been deemed good service, and that upon these grounds, and on consideration with his brethren, they had determined to return to the former practice of the court, which had been interrupted by some decisions not well considered.

Let the service already made in this case be deemed good service, serving a copy of the ejectment and of this order in the same manner again.

*Friday, April 26th.*

### CRIMINAL LAW—INFORMATIONS BEFORE MAGISTRATES.

*Ex-parte HUGHES.*

This court will not grant an order upon Magistrates to take informations against a party charged with an offence, unless it appear that the informations of the party applying were tendered to the Magistrates in writing, and the informations so tendered must be brought before the court when the application is made.

Mr. HAMILTON SMYTHE applied for an order upon Francis Hopkins and George Cusack, esquires, Justices of the Peace for the county of Meath, to take the informations of the applicant, against certain persons for a forcible entry, in order to hold them to bail.—[BURTON, J. Have written informations been tendered to the Magistrates?—The informations were not tendered in writing, but the facts were fully disclosed, and the usual practice is for the Magistrates to hear all the facts, and then reduce to writing such statements only as they deem of importance.

BURTON, J.—Written informations should be tendered, and on application like the present, these informations should be brought before us, that we may judge of their sufficiency. It is not enough that the substance of them should be stated to the Magistrates, but having been reduced to writing and tendered to them, and if they refuse to take them, on coming before us, we would, upon them, according as we considered them sufficient or otherwise, grant or refuse the motion.

No rule.

*Saturday, April 27th.*

# PRACTICE—CHANGE OF VENUE.

STAUNTON v. MAGRATH.

Mr. ATKINSON applied for an order to retain the *venue* in this case, upon the usual undertaking to give material evidence: the *venue* had been changed on a former day upon the usual affidavit. It appeared that the rule to change had been obtained on the 19th of April, and the affidavit to retain had not been filed until the 25th.

Where the *venue* has been changed upon the usual affidavit, the party seeking to retain the *venue* is not bound to come in within four days after the rule to change.

Mr. Robinson, for the defendant, objected that the application was late, and should have been made within four days after the date of the rule to change, and referred to 2 *Stewart's Forms*, 964, 965, where the practice is so stated.

The COURT, after conferring with the officer, said there was no rule in this court requiring the plaintiff to come in within four days, and

The motion to retain was granted.\*

\* By a General Rule of this court, 28th November, 1829, it is ordered, "That in all cases where an absolute order shall be obtained to change the *venue*, that it shall be added to such order, 'serving the same forthwith.' And it is further ordered that no *venue* be changed in any declaration, until it shall appear to the filacer, by affidavit, to be filed with him, that such order, together with a notice requiring the plaintiff's attorney to change the same, had been served four clear

"days previous to the changing such *venue*; and upon filing such affidavit, the defendant to be at liberty to change the same, in case the plaintiff shall have omitted so to do." Upon this rule *Stewart* remarks, "That if the plaintiff intend to retain the *venue*, the notice of the motion (which is to set aside the order to change) should be served within that time." The motion to change, and also the motion to retain, are now, by the New General Rules, both absolute in the first instance.



*Tuesday, April 30th.*

**PRACTICE—BAIL—RECOGNIZANCE FOR COSTS—  
ATTORNEY.**

ANONYMOUS.

The 8th New General Rule does not apply to an attorney giving security for costs for a plaintiff who resides out of the jurisdiction

In this case the plaintiff had been ordered, on a former day, to give security for costs, being resident out of the jurisdiction, and two persons having been tendered this day for that purpose, it was objected that one of them was a practising attorney, and the 8th New General Rule (a) was cited; but

BURTON, J.,\* thought the rule applied only to bail put in to the action, and did not apply to a party entering into security for costs, as in the present case.

Objection overruled (b).

(a) Yeo's N. G. Rules, 14.

(b) In *Leonard v. Leslie*, Exch., June, 1837, *Pennefather*, B., made a similar decision, MSS.; 2 *Stewart's Practical Forms*.

\* *Solus*.

*Saturday, May 4th.*

**PRACTICE—AMENDMENT OF JUDGMENT.**

LYSTER v. CAMPBELL.

Where the name of the *cestui que trust* in a bond on which judgment had been entered in 1817 was Mary Dowdall, and was so written in the bond, but in the judgment she was called Mary Dowd, the court allowed the judgment to be amended.

Mr. P. M. MURPHY applied to amend a judgment of 1817. The judgment was entered on a bond and warrant of attorney: the bond was executed to the plaintiff by the defendant, and the former was described therein as the trustee of the lady, in certain marriage articles, executed on the intermarriage of Archibald Nicholls and Mary Dowdall, and in the judgment the lady's name is Mary Dowd.

The COURT, after some consideration, granted the motion.

Motion granted.

*Saturday, May 4th.*

**PRACTICE—TAKING OFF THE FILE—FRIVOLOUS  
DEMURRER.**

**BAGNALL v. WALKER.**

Mr. HENRY ORMSBY applied for an order to have the demurrer filed in this cause set aside. It was an action of *assumpsit* on a bill of exchange: the declaration was in the usual form, and it was shewn, as cause of demurrer, "that it is not averred or shewn in or by the said declaration whether the plaintiff sues, or declares, or complains by his attorney, or in person."

Where a demurrer is taken to a declaration for not shewing whether the plaintiff declares by attorney or in person, the court will grant an order to take it off the file, as frivolous.

Mr. C. H. Walker, in support of the demurrer, referred to *Butler v. Mapp* (a), and to *Chitty, junior's, Precedents*, 30, where the form of this demurrer is given.

Mr. Ormsby replied, and stated that the case cited was in the Common Pleas, and the form in *Chitty* was since the passing of the New Rules in England, and the objection is only good under them.

*Per Curiam.*

Set aside the demurrer, with costs, and let the defendant in to plead issuably, rejoining *gratis*, and taking short notice of trial.

(a) 10 Bing. 391.

*Tuesday, May 7th.*

**PRACTICE—REVIVAL OF JUDGMENT—STATUTE OF  
LIMITATIONS.**

**BRADY v. FITZGERALD.**

Mr. ROLLESTON applied on behalf of the personal representative of the cognuzee, for liberty to issue a *scire facias* to revive a judgment against the cognuzor. The judgment was recovered in the year 1811. There had been no interest paid on foot thereof, and nothing to keep it

The court will not grant an order for liberty to issue a *sci. fa.* to revive a judgment more than twenty

years old, where there has not been any payment of interest, or any thing to take it out of the statute, except a written acknowledgment given since the expiration of the twenty years.

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out of the statute, but a letter, dated the — April, 1839, acknowledging the entire sum of principal, interest and costs, to be still due.

PERRIN, J., refused the motion, stating that, although the acknowledgment might be a bar to a plea under 3, 4, *W.* 4, c. 27, it is no bar under 8 *Geo.* 1, c. 4.

Motion refused.

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Wednesday, May 8th.

### PRACTICE—SCIRE FACIAS—REVIVAL OF JUDGMENT.

Executors of DILLON v. KENNEDY.

*Scire Facias* to revive a judgment of Hilary 1807—it was never revived or redocketed; the cognuzor was entitled for his life to the interest of the sum secured by the judgment. The principal to go, upon his death, to his issue. In 1837, the cognuzor was discharged as an insolvent debtor, he was seized of freehold lands which had been set up for sale under the provisions of the insolvent act. There had never been any formal payment of interest. *Held*,—that the representatives of the cognuzor were entitled to revive.

Mr. O'LEARY had, on the 22d of April, obtained a conditional order for liberty to issue a *scire facias* to revive a judgment, which had been entered in Hilary, 1807, and had never been either revived or redocketed. The conditional order had been obtained upon an affidavit, which stated, that on the 10th of July, 1805, a deed of settlement had been executed on the marriage of John Kennedy, the cognuzor, with Margaret Kehoe, then a minor and a ward of the Court of Chancery; that the settlement was made with the approbation of the Master, and pursuant to a report of the 29th of November, 1804. That a sum of £1385. 15s., part of the minor's fortune, was by that settlement vested in two trustees, James Martin and Thomas Dillon; that John Kennedy was to have the interest of this money for life, and that after his death, the principal sum was to be divided between the issue of that marriage, and a jointure of £140 a year for Margaret Kehoe, was charged on John Kennedy's freehold property. The deed of settlement authorised the trustees to lend the money to John Kennedy, upon his giving good security for it. Accordingly, on the 26th of February, 1807, £1000 of this sum was lent to John Kennedy, on the joint and several bond and warrant of said John Kennedy and of his brother Charles Kennedy; and in Hilary, 1807, a separate judgment was entered against John Kennedy on this bond. In 1812, Charles Kennedy the co-obligor died, having devised to his brother John the lands of Old Court, a fee-simple estate of about £200 a year, and John Kennedy was in possession of this estate, from 1812 until 1837, when he was discharged as an insolvent debtor. The lands of Old Court had been set up for sale, in the matter of the insolvency, but the purchase money was not yet paid, nor was the purchase deed executed. John Kennedy had no other property but these lands of Old Court.

The application to revive the judgment was made, nominally, on behalf

of Marcella Dillon and Patrick Plunkett, the executors of the surviving trustee Thomas Dillon, to whom the bond and warrant had been executed; but the real applicants were John Kennedy's two sons, who, on his death were to become entitled to the principal sum secured by the judgment. The conditional order was, by direction of the court, served not only on the cognuzor (the insolvent), but also on his assignee and on the purchaser.

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Mr. *Blake*, Q. C., with whom was Mr. *Gibbon*, this day, on behalf of the scheduled creditors, shewed cause against making the conditional order absolute. They insisted, that as there was no payment on account of principal or interest for over twenty years, the right to recover the amount of the judgment was barred by the 8 G. 1, c. 4, and further, that the assignee of the insolvent and his scheduled creditors were purchasers, and therefore the redocketing act operated as a bar to the right to revive this judgment.

Mr. *Moore*, Q. C., with whom was Mr. *O'Leary*, *contra*, contended that the 8 G. 1, c. 4, did not apply to this case; for that John Kennedy being himself entitled for his life, to the interest of the sum secured by the judgment, there was no one but himself competent to demand the interest, and therefore, either the case was not at all within the provisions of the 8 G. 1, or if it was, then the perception of the rents and profits of the land, subject to the judgment, was tantamount to a payment of the interest of the money secured by the judgment, and for this, they cited *Dillon v. O'Fallon* (a).

And as to the redocketing act, they insisted that the assignee and creditors, though purchasers, were not purchasers for valuable consideration, within the meaning of that act; for, that it had been repeatedly decided, that in bankruptcy, the assignees took the bankrupt's estate, subject to all the same liabilities and equities as affected it when in the bankrupt's own hands; and for this, they referred to *Vandenanker v. Desborough* (b); *Copeman v. Gallant* (c); *Bennett v. Davies* (d); *Ex parte Chion* (e); *Joy v. Campbell* (f); *Scott v. Surnam* (g); *Winch v. Keely* (h); *Carpenter v. Marnell* (i); *Gladstone v. Hawden* (k); *Ex parte Gennys* (l). And in this respect there was not any difference between the case of bankruptcy and that of insolvency; and, therefore, the present application should be dealt with precisely in the same way

(a) 2 Sch. & Lef. 13.

(c) 1 P. Wms. 315.

(e) 3 P. Wms. 187, note.

(g) Willes, 400.

(i) 2 B. & Pul. 40.

(b) 2 Vern. 96.

(d) 2 P. Wms. 316.

(f) 1 Sch. & Lef. 328.

(h) 1 T. R. 619.

(k) 1 M. & Sel. 517.

(l) Montague & M'A. 259.

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as if it were an application against the cognuzor himself, before he was discharged as an insolvent: the more particularly, as the intended purchaser had actual notice of the existence of this judgment, and as he had executed the purchase deed or paid the purchase money.

*Per Curiam.*—Disallow the cause shewn, but without costs. \*

\* On the 5th day of June, the Court of Common Pleas gave liberty to revive another judgment against the same cognuzor, under circumstances nearly similar to those of the principal case. The judgment revived in the Common Pleas had been entered in Trinity Term, 1815, on a bond and warrant executed in that year by the said John Kennedy, and one Robert Craig, to secure the repayment of £385. 15s., the residue of Margaret Kehoe's fortune, which had been lent to John Kennedy by the trustees of the settlement.

*Wednesday, May 2d.*

#### DIVISIONAL JUSTICES—INFORMATION—EXCISE LAWS.

##### The QUEEN v. PICKERING.

The Divisional Justices of the Head Office of Police of the city of Dublin, have jurisdiction to hear and determine at all times, offences committed in the county of Dublin against the excise laws under the 7 & 8 G. 4, c. 53.—PERRIN, *du-bitante*.

*Semble:* that where a party appears and pleads not guilty, and then obtains an adjournment of his case a couple of times, he waives formal objections to the information, in not shewing accurately that the court had jurisdiction to inquire into the case.

This was an information against the defendant for a violation of the excise laws; it came before the court by *certiorari* to the magistrates of the Head Office of Police for the city of Dublin, the return to which was as follows: county of Dublin to wit.—Be it remembered, that on the 27th day of, &c., at the office of the Castle Division of the Police district of Dublin metropolis, at the Exchange Court in the county of the city of Dublin, W. Mathews exhibited an information against the defendant, by order of the Commissioners of Excise, before A. Hamilton, one of the justices of the peace for the county of Dublin, wherein the offence was committed; and then stated, that defendant was a paper maker in the county of Dublin, that he had within the previous four months unlawfully removed a quantity of paper, to wit, &c., with intent to defraud, &c., and thereby forfeited £100; there was a second count for the forfeiture of the goods seized; that the defendant, having been previously summoned to make defence, personally appeared at the Head Office of Police in the county of the city of Dublin, before A. Hamilton, J. P. for the Castle Division of the Police district of the Dublin metropolis, and also a J.P. for the county of Dublin, and Joseph Gabbett, J. P. for the College Division of Police of said district; that defendant pleaded not guilty, and prayed an adjournment, and subse-

quently appeared before two of the justices of the peace for the Head Office of the district of the Dublin metropolis, and also, for the county of Dublin, and after a further adjournment, he again appeared before the same two justices, and objected to the jurisdiction of the said magistrates, inasmuch as the offence alleged in the information purported to have been committed in the county of Dublin, and not within the county of the city of Dublin, and that it did not appear in and by the said information, that the said justices had jurisdiction to try the said offence in the county of the city of Dublin, whereupon the said magistrates refused to enter into the merits of the said information, and dismissed the complaint.

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Mr. *Tomb* now moved to quash this order of dismissal.—The question is, whether the magistrates of the Head Office have jurisdiction as justices, to hear excise informations under 7 & 8 *G. 4*, c. 53, for offences committed in the county of Dublin? This act empowers one justice of the peace to hear, and two to determine upon an excise information. By the 48 *G. 3*, c. 140, s. 2, the limits of the police district are eight miles round the Castle of Dublin, and the divisional justices are within this district “for all intents and purposes” justices of the peace, and in this circuit they are authorised to act judicially and ministerially. By the 5 *G. 4*, c. 102, s. 9, the justices of the Head Office are created justices of the peace “for all intents and purposes,” for the counties of Dublin, Wicklow, Kildare and Meath. The 11th section of this act raises the doubt, but the object of this section and the proviso in it, is to prevent their being occupied with trifling offences where they act ministerially, but it does not interfere with the general authority, to act as justices to all intents and purposes before given. The 59 *G. 3*, c. 92, s. 4, empowers justices of the peace for counties at large, to act within any city adjoining, being a county of itself; except as to matters arising within the same city. The plea to the jurisdiction is late after the defendant pleaded not guilty.

Mr. *F. T. Porter*.—The Head Magistrates are Justices of the Peace for the county of Dublin, and if they had chosen some place within the county for determining this case, it would have been good; the magistrates may go into the district in the adjoining counties where an offence is committed, but there is no authority for bringing parties from the county into the city or *vice versa*. There is no averment that the justices before whom the information was preferred, are justices of the Head Office of Police; they are merely described as justices of the peace for the county of Dublin. The place for which the magistrates act must be shewn, and that the offence was committed within the limits of their jurisdiction; or facts stated, which give them jurisdiction beyond

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those limits, *Kite & Lane's Case* (a); *King v. Seale* (b). Nor is there any averment that the city of Dublin is adjoining to the county. These should all appear upon the face of the information, to shew the magistrates had jurisdiction. The court will take judicial notice of the counties, but it cannot of the local situation of the different places in them. [BURTON, J. Does not the 59 G. 3 enable justices of counties to act judicially in adjoining cities?—Yes: but it is in offences committed in the cities.—[CRAMPTON, J. That is not the construction of the act.]—We are entitled to appeal; where are we to appeal to? If we go to the Recorder, he says the venue is laid in the county of Dublin; if we go to the Chairman of the county, he says the conviction did not take place in the county? Mr. Gabbett, it is not pretended, had any jurisdiction to hear this information.

Mr. Tomb replied.—The defendant has cured any irregularities in the first meeting, by appearing subsequently, before two magistrates of the Head Office; and the court will take judicial notice, that the county of Dublin is adjoining to the city. The cases cited do not apply, they being cases as to the form of convictions, and not of the information.

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PERRIN, J., said, that the court entertained no doubt, that the magistrates had jurisdiction to entertain informations like the present. They were magistrates for all intents and purposes. I had some doubt upon the 65th & 67th sections of the 7, 8 G. 4, c. 53, which enacts "that the justices in the several counties shall hold sessions once in every three months," to adjudge excise cases; whether they had jurisdiction except at such sessions.

BUSHE, C. J., said, he had looked into these sections, and that he did not think the enactment as to sessions discharged other justices from the performance of their duty, and still less prohibited them. The 59 G. 3, c. 92, and 5 G. 4, c. 102, are quite express as to the jurisdiction of these justices, to entertain such informations.

CRAMPTON, J., thought it would be a construction which would cause very great inconvenience to restrict the jurisdiction of the justices to the sessions, which the act directs shall be held every three months. The jurisdiction is given to the justices of the peace, or to any two or more of them very generally, by the 65th section, and when the information is exhibited, they are required to hear and determine it.

BURTON, J.—The clause is entirely affirmative, and where that is so, it cannot exclude the general jurisdiction given in the previous clause—

Let the order of dismissal be quashed, and the information returned to the magistrates to be adjudicated on.

(a) 1 B. & C. 105.

(b) 8 East. 569, *note*.

*Saturday 27th, and Monday 29th April*CRIMINAL LAW—EVIDENCE—HUSBAND AND WIFE—  
INTERESTED WITNESS.The QUEEN at the prosecution of H. J. TUCKER v. PETER YORE and  
others.

MISDEMEANOR.—This was an indictment under 10 G. 4, c. 34, s. 23, against Peter Yore, and several others; it was found at the Quarter Sessions for the city of Dublin, and removed into this court by *certiorari*. The first count was as follows:—"County of the city of Dublin, to wit: The jurors of our lady the Queen, upon their oaths present, that Peter Yore, late of the Parish of St. Michan, in the county of the city of Dublin, yeoman, on the 13th day of April, in the year of our Lord 1838, and in the first year of the reign of our sovereign lady the Queen Victoria, at the parish aforesaid, in the county of the city of Dublin aforesaid, did fraudulently allure, take, and convey away, and did fraudulently cause to be allured, taken and conveyed away, Hannah Jane Tucker, out of the possession and against the will of Mabel Tucker, her mother, she the said Mabel Tucker having then and there the lawful care and charge of her the said H. J. Tucker, then and there being an unmarried girl under the age of eighteen years, and then and there having a certain legal interest, to wit, a vested estate in remainder in certain real estate, and did then and there contract matrimony with the said H. J. Tucker, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity." The second count charged five other persons with being "present, counselling, aiding and abetting the said Peter Yore, the misdemeanor aforesaid to do and commit, and did then and there counsel, aid and abet the commission of the said misdemeanor against the form of statute," &c. There were sixteen other counts in the indictment, but no material variation in the statement of the offence; the statement of the interest which she had in the property was varied. Evidence was given that H. J. Tucker was entitled to a vested estate in remainder to the amount of £600 a-year, and Mabel Tucker proved that she was the wife of Colonel Tucker, and mother of Hannah Jane Tucker; that on the 18th of April, Yore, who was her servant man, said he should bring the car-horse to the forge, as he required to be shod, and took it out accordingly; that some time after, her daughter went out to ride, accompanied by another of the traversers,

Upon the trial of an indictment under the 10 G. 4, c. 34, s. 23, for fraudulently alluring away a girl under 18 years of age, and contracting matrimony with her; *Held* that she is not an incompetent witness for the prosecution, either on the ground that she was the wife of the defendant, or that she has a direct interest in the event; in consequence of the provision in this clause, that upon conviction of the offender her property shall vest in trustees for her sole and separate use; *PERRIN, J.*, qualifying his opinion on the second objection thus, "that it did not appear from the circumstances disclosed in this case, that the witness had any pecuniary interest;"

*Held also*—that where the crime was effected by menaces of personal injury, it is an offence within the 23d,

and not within the 23d section.



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as she was accustomed to do ; that she gave no consent to her daughter's marriage, and if any such took place, that it was against her will ; that she had on that day the care and possession of her child, who was under eighteen years of age ; that she afterwards heard of the marriage, for the first time, in September following, and that she had Yore removed from the house, he demanding her daughter as his wife, and saying she was married to him for five months. Hannah Jane Tucker proved, that about two months before the 18th of April, Yore spoke to her about marriage, and she made no answer ; a few days before the 18th, he again asked her to marry him, when she said she would tell her mother, upon which he threatened to take her life if she told her mother ; the same was repeated next day, and she refused to marry him, upon which, he said he would shoot her if she told her mamma ; on that evening he told her that she should go next day to Flood's (a public house in Paradise-row) ; on the following morning he threatened her again if she did not marry him, and desired her to go towards Paradise-row, when she rode out ; that under the influence of these threats she did so, and on her way she met him, and went to Flood's, where the other traversers were, and with them went to a degraded clergyman in Smithfield, where she was married ; she afterwards returned home. In her cross-examination she denied that Yore had ever taken the slightest liberty with her. For the defence, a Roman Catholic Clergyman was produced, and he swore, that subsequently to the marriage, Miss Tucker called upon him two or three times, and urged him most earnestly to marry them, and that the impression she left upon his mind was, that Yore being a Catholic, she did not think the previous marriage was binding upon him. When she was cross-examined as to this, she stated she acted under the same influence of intimidation as when she went to be married, and that she went there by Yore's directions.

When Miss Tucker was produced, counsel for the traversers objected that she was incompetent upon two grounds, first, as being the wife of Yore ; and secondly, on the ground of interest. The learned Judge reserved these questions for the consideration of the court ; and upon the conclusion of the case for the prosecution, the counsel for the traversers submitted that the indictment was not sustained, as it stated a case of fraud, and the evidence proved a case of force, which objection the learned Judge also reserved ; and in his address to the jury he told them, that the fraud in the statute was not confined to the daughter but extended to the mother, and the statute would apply even if the daughter co-operated in practising the fraud upon the mother. If they believed Miss Tucker was taken by constraint, then the crime would not be within the section of the statute under which the indictment was framed, and they should acquit the traversers. To this direction the counsel for the traversers also objected, that upon the second ground

above stated, he should have directed an acquittal, and this objection was also reserved, and subject to these objections a verdict of guilty was recorded.\*

Mr. *Holmes* upon a former day obtained a rule *nisi* to set aside this verdict; against which

Mr. *Macdonagh*, with whom was Mr. *Smith*, Q. C., now shewed cause.—The competency of Hannah Tucker, otherwise Yore, is to be tested by the record, not by the evidence she gave. There is no doubt about the general principle as to the evidence of husband and wife for and against each other: first, that they cannot give evidence for one another, on the ground that they are one and the same person in affection and interest; and secondly, they cannot give evidence against one another, because of the implacable dissension which might be caused by it, 2 *Hawk. Pleas of the Crown.*, c. 46, s. 67. The grounds on which their evidence is thus excluded are important; and also the exceptions which have been allowed to this general rule. The present case is an exception to this rule upon three grounds; first, because the rule does not apply to a person who is a wife *de facto* and is not a wife *de jure*; secondly, upon the principle of necessity; and thirdly, because the de-

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\* 10 G. 4, c. 34, s. 22, enacts, "That if any person shall by force, take or carry away any woman or girl against her consent, with intent that such person or any other person shall marry or defile her, every such offender and every accessory before the fact, shall be guilty of felony, and being convicted thereof shall suffer death as a felon."

22 s. enacts, "That when any unmarried girl under the age of 18 years, shall have any interest whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any having such interest, if any person shall fraudulently allure, take or convey away, or cause to be allured, &c., such girl out of the possession and against the will of her father or mother or of any other person having the

lawful care or charge of her, and shall contract matrimony with her, or shall defile her, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to imprisonment not exceeding three years and shall be incapable of taking any estate or interest legal or equitable in any real or personal property of such girl; and such property shall upon such conviction, be vested from the time of such marriage in such trustees as the Lord Chancellor shall appoint, for the sole and separate use of such girl in the like manner as if such marriage had not taken place."

40 s. "Persons who shall counsel, aid or abet the commission of any misdemeanor punishable under this act, shall be liable to be proceeded against and punished as a principal offender."

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fendant cannot by his own criminal act exclude the evidence of his crime. The crime under the statute is not accomplished unless there is a contract of marriage, it is an essential element of the crime; but it is not necessary that this should be a marriage *de jure*, a marriage *de facto* being sufficient. It was so held in *Fulwood's Case* (a), decided upon 3 Hen. 7, c. 2: and one of the grounds of the decision as given in 1 *Hale's Pleas of the Crown*, 301, in *Brown's Case* (b) was, that the marriage, though a marriage *de facto*, yet, if it were effected by force, was not a marriage *de jure*, for it was dissoluble by divorce. The force constituted the crime under that act, the fraud constitutes the crime in the present case, and each alike renders the marriage a marriage *de facto*, and not *de jure*. By the 9 G. 2, c. 11, s. 1, the marriage on the record is declared null and void, and this before the witness opened her lips; it was a nullity, or, as in the case in *Hale*, was dissoluble by divorce, and not therefore *de jure*, and the wife's testimony was properly received upon the authority of that case. In *Wakefield's Case* (c), Hullock B., says to the Scotch Advocate, who appeared to prove that the marriage in that case was a valid marriage, "I should just ask him whether he ever knew when a person inveigled away, under false pretences, by misrepresentation, afterwards consented to marry, that would be a good marriage." There is no case where a marriage effected by fraud was a marriage *de jure*, it is a marriage *de facto*. Upon the second ground, our law recognises the admission of the wife's evidence, on the ground of necessity; and for this reason, that otherwise the statute might be "vain and useless," for all present might be co-conspirators, 1 *Hale's Pleas of the Crown*, 301; 2 *Stark. on Ev.* 403, where several cases are collected in which this ground of admission has been acted on. As to the third ground; can a man create a protection by committing a crime? Hullock, B., in *Wakefield's Case* (d) says, "suppose after the marriage, the husband had proceeded to any other violence, would she have been precluded by this supposed marriage, the husband's wrong, from giving evidence of the circumstances prior as well as subsequent to the marriage? It would be unreasonable to say so." Miss Turner was subsequently admitted in the House of Lords, to shew that she consented to the marriage under the influence of a domination obtained over her mind by the traverser. Hullock, B., in the conclusion of his judgment said, "that even if the marriage were legal, which he doubted, he would admit the evidence," and when the counsel for the traversers said the evidence never was admitted except in a case of force, he asked him whether he was aware of *Rex v. Perry*, in which he had reason to know there was no force. In the present case

(a) Cro. Car. 482, 484, 488, 492.

(c) Murray's Rep. 247.

(b) 1 Ven. 243, S. C. 3 Keb. 193.

(d) 2 Lewin C. C. 288.

there is no difficulty about the marriage, because it is null and void under the 9 G. 2, and therefore this is a much stronger case than *Wakefield's*. The only case on the other side is *Rex v. Serjeant* (a); the indictment in that case was for a conspiracy to defraud the prosecutor of his property, it did not affect his person or liberty, and that is essentially different; and if it was similar, having been decided in the year 1826, *Wakefield's Case* must have overruled it, or it was considered not to apply to such a case. In *Rex v. Perry* (b), this evidence was admitted in a case like the present, and it was upon the authority of that case *Wakefield's Case* was decided. The indictment in *Wakefield's Case* is precisely similar to the present; that in *Serjeant's Case* is quite different from both. As to the second objection on the ground of interest, that is answered by the cases of larceny, in which the owner of the stolen goods is a competent witness, although they are returned to him if the prisoner is convicted. And in prosecutions where there are rewards, although the reward can only be the effect of the conviction, the prosecutors are competent witnesses; it is so laid down *per curiam* in *Rudd's Case* (c); and also in *The Rioters' Case* (d). And in *Rex v. Fox* (e), where a party laid a wager that he would convict another, his evidence was admitted; and similar evidence was admitted, on the ground, that where the nature of things allows no other evidence, or where the transactions are so private as that there cannot be other evidence. In *The Queen v. Macartney* (f); and in *The Queen v. Sewell* (g), Holt, C. J., said "that where a man is interested in that which he swears for, if it be that the doing of the act which he is now evidence to invalidate, was a means to obtain his liberty or an exemption from corporal punishment, he shall be a witness." The next question is, was there misdirection by the learned Judge? If fraud be practised upon the parent, although the child consent to go away, that would bring the case within the statute; the consent of the infant is implied in the 23d section; it says, "out of the possession and against the will of" the person having the lawful care of the girl. In *Rex v. Twiselton* (h), the defendants were found guilty for seducing away an heiress, and although the girl consented, the court took no regard of this, upon the ground that the parents might maintain trespass, on the statute 4 & 5 P. & M. c. 8. The mischief which the several statutes were enacted to prevent, namely the 3 Ed. 1, c. 13; 3 Hen. 7, c. 2; 10 Car. 1, Sess. 3, c. 17, and 9 G. 2, c. 11, was the marriage of the infant without the consent of the parent, or consent of guardian; which object is also manifest this act had also in view.

(a) Ry. &amp; M. N. P. C. 352.

(b) 2 Russ. C. &amp; M. 577.

(c) 1 Leach C. L. 132.

(d) 1 Leach. C. L. 314, note.


(e) 1 Str. 652.

(f) 1 Salk. 286.

(g) 7 Mod. 118.

(h) 2 Keb. 432, 438, S. C., 1 Sid. 387, &amp; 1 Lev. 257.

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Messrs. *Holmes and Fitzgibbon, contra.*—The conviction is contrary to law, illegal evidence having been admitted; and the charge of the learned Judge being incorrect in point of law. This conviction has been had upon evidence, part of which was admissible under the 22d section, and part under the 23d section, and by blending the law upon the crimes in these two sections. To constitute the offence in the 22d section there must be force; physical force is not alone meant: but upon the sound construction of the statute, moral force is included; threats of physical force; and if a case of that description was made out, it would come within the 22d section. If a party say he will shoot another unless that other will do a certain act, and the latter is thus deprived of free agency, the act done must be against the will of the party; and if force in the 22d section comprehends mental force as well as physical, there is an end of this case. Evidence applicable to the 22d section was admitted, and which was totally inapplicable to the 23d section; that section not contemplating force of any kind. The words of it are, "if any person shall fraudulently allure, take, or convey away:" does it say against her consent? No; and whether you apply the word "fraudulently" to the mother or to the daughter or to both, it is manifest it does not apply to force physical or mental. To "allure" by force is a contradiction in terms, and it would be monstrous under this section to send to the jury evidence of force. Then the words "and shall contract matrimony with her" occur: there is no offence without a marriage—a void marriage is nothing; and if there was not a marriage *de jure* as well as *de facto*, the crime has not been committed. If this marriage is within the 9 G. 2, c. 11, the offence is not committed. The statute contemplates a valid marriage, by vesting the property for the future in the Lord Chancellor. The object was, not only to guard against the offence by punishment, but also to deprive the offender of the fruits of a legal marriage. The ground for admitting the evidence in *Fulwood's Case*, and also in *Brown's Case* (a) was the existence of force in these cases, and so it is expressly stated in *Hale P. C.* 301; and in the same book it is stated, that if the wife subsequently assented to the marriage, although married by force, she would be an incompetent witness; and is there not in this case abundant evidence of subsequent assent, in her entreaties to the Rev. Mr. Yore to marry them again? The next ground of Miss Tucker's incompetence is this, that upon producing the record of conviction, she is entitled to have this property vested in trustees, for her sole and separate use. It has been contended that this evidence is admissible upon the ground of necessity; but no such necessity has been shewn to have existed in this case. If the case rests upon force practised upon the daughter, or upon fraud practised upon the mother, there would be clear

(a) *Hale P. C.* 301.

evidence without Miss Tucker: the mother would be competent to prove fraud upon herself, and there were persons cognizant of all the transactions left out of the indictment, who could have proved every thing. [BURTON, J. It is not necessity in the particular case.]—No; but the ground of the exception only goes to this, that in a particular class of cases, the wife may be the only witness, and that the general principle would prevent justice unless this exception was allowed. To prove a fraud practised on the mother, it is not necessary to produce the wife; and when the proposition is laid down, it must be applied to the particular offence, and thus the evidence is admitted in cases of rape; and it will only be admitted upon the ground, that if excluded, there would be a general failure of justice in the particular offence. In *Rex v. Locker* (a), the wife would not be admitted to give evidence in favor of her husband on an indictment like the present; and it is established in a number of cases that the principle is the same, whether the wife is produced in favor of or against the husband. It was so ruled in *Rex v. Serjeant*, in a case like the present where the testimony of the husband against his wife was rejected, and this case was not cited in *Rex v. Wakefield*. The indictment in *Wakefield's Case* was for a forcible abduction. Serjeant Frost stated that he opened a case of force.\* Even after the relation of husband and wife has ceased by divorce or death, they are inadmissible to prove for or against one another, *Doker v. Hasler* (b); *Rex v. Frederick* (c); *Rex v. Smith* (d). And this, where the accused even consented that his wife should be examined against him, *Barker v. Dixie* (e). In *Rex v. Hood* (f), the wife was held inadmissible to prove an *alibi* for a prisoner not her husband, but a co-defendant, which shews how far the courts have carried this principle. In all cases of bigamy, the first wife is inadmissible; and also in cases of high-treason; *Anonymous* (g), and 1 *Hale's Pleas of the Crown*, 301, 660, 661. In cases of bankruptcy she is not admissible to prove bankruptcy, and even where by late acts she is made competent, it does not extend to that, or to an indictment for embezzlement. There is an exception to cases affecting her person and liberty, but that means force upon the person; and in *Lord Audley's Case* (h) there was a capital felony committed on the wife. In assaults also she may swear the peace against her husband, on the same principle, *Rex v. Azire* (i), but this is on the ground of force; and even in such cases the wife would not be competent unless the force was continuing, *Fulwood's*

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\* That part of the charge was afterwards given up—there being no evidence to sustain it.

(a) 5 Esp. 107.

(c) 2 Str. 1095.

(e) Lee's R. 264.

(g) Brownlow 47.

(b) Ry. &amp; Moo. N. P. C. 198.

(d) Moo. C. C. 289.

(f) Moo. C. C. 281.

(h) 1 St. Tr. 387.

(i) 1 Str. 633.

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*Case (a).* There is nothing to shew this was not a legal marriage unless they resort to force; such marriages have been held marriages *de jure* in prosecutions for bigamy; and if she be held admissible, it must be as the lawful wedded wife of Yore.—[CRAMPTON, J. Do you class marriages within the 9 G. 2, c. 11, as marriages *de jure*?]—The marriage under that act may be a valid marriage, and at worst, is a voidable marriage.—[BURTON, J. A voidable marriage is a marriage *de jure*.]—It is *prima facie* good until dissolved, and if issue was born and one of the parties died before it was dissolved, under 9 G. 2, the issue would be legitimate. It is only a marriage effected by force that can make the wife competent; such were the marriages in *Hale*, and if the marriage in the present case was such a marriage, the crime is within the 22d and not within the 23d section.—[CRAMPTON, J. The 23d section obviously intends a valid marriage, for it uses the words “her sole and separate use.”]—The next ground upon which Miss Tucker’s evidence was inadmissible is, that she was deeply interested in the result; and upon that ground incompetent upon a well known rule. Where a party seeks to procure a conviction, in order to get back her property, that party has been held incompetent, *Rex v. Williams (b)*. A person who has an interest may be made competent by the words of the act, and thus under 28 Hen. 8, c. 10, a party robbed is entitled to a restitution of his property, upon prosecuting the felon to conviction. A person upon whom a forgery was committed was incompetent to prove the forgery until the 9 G. 4 c. 32. A party may be held competent in a case where he could not use the record of conviction for his benefit in a civil action. A conviction for deer stealing was quashed, because the same person was both informer and witness, and was entitled to a part of the penalty, *Rex v. Tilly (c)*. In *Rex v. Cole (d)*, the informer was allowed to give evidence, because the acts under which the information was brought left a discretion in the court to inflict corporal punishment or impose a fine, and the objection of interest was held to go to his credit merely. In revenue cases it has been necessary to make the officers competent by statute. The same principle was recognised in *Rex v. Wandsworth (e)*; *Rex v. The Inhabitants of Ferrington (f)*, and *Hampden’s case (g)*. The bail to an action have been held incompetent witnesses for the defendant. The next ground upon which the traversers are entitled to a new trial is, that the charge of the learned Judge was calculated to mislead the jury. The direction as to whether the case was

(a) Bro. Car. 488.

(c) 1 Str. 316.

(e) 1 B. & Al. 63.

(b) 9 B. & C. 549.

(d) 1 Esp. 169, S. C. Peake, 284.

(f) 15 East. 471.

(g) 9 St. Trials 954

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a case of fraud or of force is not quarrelled with; but the objection is this, that the fraud which they were to find upon was a mixed fraud on both. If the construction is, that, to bring the case within the statute, the fraud must be upon the mother, it would be wrong to leave to the jury any thing with respect to fraud upon the daughter; and *vice versa*. Unless you hold that the fraud contemplated by the statute, was fraud upon the mother or daughter or both, the direction of the Judge was wrong, and if the fraud contemplated exclusively one or other of them, the charge of the learned Judge was calculated to mislead the jury. If the fraud must be upon the daughter, then there was no evidence to go to the jury.—[BURTON, J. If there was evidence of fraud upon the mother and also upon the daughter, would that vitiate the verdict?—It would be impossible then to say what the jury found upon; they may have found upon fraud practised upon the daughter alone, which is against the entire evidence of the case, which proved a case of moral force, the apprehension of physical force, and was within the 22d section of the statute. [CRAMPTON, J. Do you think a threat to shoot, without stating time or anything of that sort, can be construed force?—It is moral force, if it effects the object for which it was used.—[PERRIN, J. Is it force within the 22d section?—If it be not force within that section, it certainly is not fraud within the 23d section. As to the cases which have been cited; in *Rex v. Twiselden* (a), it does not appear that the wife was produced as a witness at all; in *Rex v. Mahartney* (b), it does not appear that the witness had any interest in the result; the *Queen v. Sewel* was a usury case, and does not apply; *Fox's case* is clearly distinguishable upon the ground, that a party cannot deprive the public of his testimony by his own act. In the present case, the interest is not created by the witness, but follows directly from her testimony.

Mr. Smith, Q. C., replied.—The wife is a competent witness against her husband in all injuries of a personal nature, 2 *Russell on Crimes*, 606, and 2 *Stark. on Evidence*, 404, note y. In the cases tried under the abduction statutes in England, the objection on the ground of interest was just as strong as in the present. In *Fulwood's case* (c), the wife had a fortune of £1300; and in *Browne's case* (d), she had £5000, which on marriage vested in the husbands, and although the effect of the convictions was to restore these sums to them, no objection was made as to the competency of the wives upon this ground. It is said the present case is not governed by these cases, because the marriage in those cases was a marriage *de facto* and not *de jure*: but the answer to that is, that whether the marriage was *de facto* or *de jure*, was only learned from her testimony when given.—[PERRIN, J. The indictment in these cases

(a) 1 Lev. 257.

(b) 1 Salk, 286.

(c) Cro. Car. 488.

(d) 3 Keb. 193. S. C. 1 Vent. 243.



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charged force, while the present charges fraud against the mother.]— In those cases that distinction was certainly observable, and in all the cases prior to *Wakefield's case*; but the existence of force is not the only reason given for admitting the evidence in *Browne's case*; but one of the strongest grounds of the decision is, the necessity of the case. The law upon this subject has been settled by *Wakefield's case*, the count for force having been abandoned, there being no evidence to sustain it. *Serjeant's case* is quite different, the charge being for procuring a marriage; here it is for "conveying away," which is a personal injury to the child. On the ground of interest this principal is well settled; that where a statute law could receive no execution unless a party interested were a witness, there he must be allowed; and when the statute can have no proof but by the person in interest, there the rules of the common law are presumed to be laid aside by the statute, that it may have its effect; *Gilbert on Evidence* 114, and also the case of *Heward v. Shipley* (a), where Lord Ellenborough says "the statute has given a parliamentary capacitation to the witness;" and so has the statute in the other case, for if her testimony were not received, there would be a complete failure of justice. There is no dispute about her competency to prove the offence described in the 22d section; and the legislature never could have intended to exclude her testimony, where from the nature of the crime, the greater necessity existed for it; and why cannot the ground of necessity get over the objection of interest, as well as over the legal objection arising from the relation of husband and wife?—[PERRIN, J. Suppose the words of the indictment charged "defiling" instead of "contracting matrimony."]—Just so; who could then prove this but herself? there could be no doubt then as to the admissibility of her testimony. As to the objection to the charge of the learned Judge, that he did not direct the jury that the fraud should be practised upon the child alone. In *Hart v. Aldridge* (b); *Woodward v. Walton* (c), and *Dicham v. Bond* (d) it was held, that parents or masters may maintain trespass for seducing or enticing away their children or journeymen, which therefore shews that such offences are of a forcible nature. The effect of the 10 G. 4, c. 34, and 6 Anne, c. 16, was to make that a criminal offence, which had been before a civil injury. The 22d section gives the remedy to the child not to the parent; the 23d section gives it to the parent even against the child; and on this part of the argument the case of *Hayes v. Smith* (e) is in point.

Wednesday, May 8th.

BUSHE, C. J., this day delivered the judgment of the court.—This case

(a) 4 East. 183.

(c) 2 New Rep. 476.

(b) Cooper 54.

(d) 2 M. & Sel. 436.

(e) Sm. & B. 378.

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comes before the court upon shewing cause against the conditional order for a new trial, which was obtained by the defendants, who were found guilty upon an indictment under the 23d and the 40th sections of the 10 G. 4, c. 34, against Yore as the principal, and against the other traversers as aiding and assisting him in fraudulently removing Hannah Jane Tucker, out of the care and possession of her mother, Mabel Tucker, and marrying her. Three grounds have been stated upon which it has been sought to obtain a new trial: *First*, upon the admission of illegal evidence; *Secondly*, upon the misdirection of the learned judge; and *thirdly*, that the verdict was against law and evidence. To sustain the first ground it has been alleged that Miss Tucker was an incompetent witness on two grounds; *First*, as being the wife of Yore; *Secondly*, as having a direct pecuniary interest in the result, under the provision in the 22d section of the act, which vests the property in trustees to the sole and separate use of the wife, on conviction. As to the first of these objections to the admission of Miss Tucker's evidence, it is unnecessary to discuss it, as the question was decided in *Wakefield's case*, by the admission of Miss Turner's evidence. That case afterwards went to the Queen's Bench, on a motion in arrest of judgment, and no question was raised as to the propriety of Baron Hullock receiving the evidence of Miss Turner. This case shortly afterwards went to the House of Lords, and Miss Turner's evidence was again received, on that occasion, although objected to. As to the objection upon the ground of interest, by her property vesting in trustees for her sole and separate use, in case of conviction, it cannot avail, because by 9 G. 2. c. 11, such marriage is void, on certain proceedings being taken within a certain time. Whether or not such proceedings have been commenced we do not know, but we cannot presume that they have not, and if they have been, they must be successful. The rule that a party who is interested in the result cannot be a witness, is subject to this objection, whether the benefit is given by the legislature; and in the judgment of Mr. Justice Bayley in *Rex v. Williams (a)*, it is laid down as a rule that "when a statute confers "a benefit upon a person who but for that benefit, would have been a "witness, his competence is virtually continued;" and also "where it is "plain that the detection and conviction of the offender are the objects "of the legislature, the case will be within the exception, and the person "benefitted by the conviction will, notwithstanding his interest be competent." There is no doubt of the application of this case, to the case before the court; and when we connect the recital of the 10 Car. 1, St. 3, c. 17, in the 10 Geo. 4, c. 34, there can be no doubt of the mischief which the latter act was intended to remedy; namely, "the marriage of infants who be inheritors, without the consent of their parents." As to the objec-

(a) 9 B. &amp; C. 556.

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tion that the learned Judge misdirected the jury, in telling them that the fraud contemplated by the statute was not limited to fraud upon the infant alone; his Lordship (having read the section) said that the rule *reddendo singula singulis* applied to the words in this section, and the proper construction was given to this clause. It was then contended that the verdict was contrary to evidence; and that the evidence was applicable to a crime under the 22d, as well as under the 23d section; but the jury were directed if they believed the traversers exercised force in effecting the marriage, that they should acquit the traversers. It is true according to Miss Tucker's evidence, that the motive by which she was actuated was an habitual apprehension of violence; it is impossible to construe this force, or adopt the construction put upon that word in the 22d section, and therefore upon all these grounds the cause must be allowed.

PERRIN, J.—I concur in the judgment of the court, but I wish merely to state, that I am against the objection to the admissibility of Miss Tucker's evidence upon the score of interest, because it does not appear to me, that she has any pecuniary interest under the circumstances disclosed in this case.

Rule discharged.

## EXCHEQUER OF PLEAS.

*Thursday, January 31st.\**

## PRACTICE—TAKING DEFENCE TO EJECTMENT—PART AND PARCEL.

*Lessee of The Earl of LISTOWELL and others v. the Casual Ejector.*

Mr. WILLIAM PORTER, on behalf of Michael Linehan and four other persons, applied that the lessors of the plaintiff should, so far as regarded the applicants, be restrained from proceeding further in the ejectment in this cause, until they had declared for lands in their possession. The persons on whose behalf the present application was made had been served with the ejectment, which purported to be brought for the recovery of part of the lands and commons of Ballygrogan, part of the lands and commons of Lisavoura, and part of the lands and commons of Lisard. The applicants denied that any part of the lands and commons in the ejectment described was in their possession, in as much as they insisted that the lands in their possession were part of the lands of *Toureen*, and that they had been so known and called from time immemorial. To prevent themselves being prejudiced by the ejectment with which they had been so served, they called upon the attorney for the lessors of the plaintiff, by notice, to declare for lands in their possession, in order that they might, separately, or otherwise, take defence to the action, and thereby be enabled to protect their rights. No answer having been returned to that notice, the present application became necessary.—[PENNEFATHER, Baron. Have these parties taken defence?—] They have not.—[PENNEFATHER, Baron. Defence ought to have been taken before this application was made. The proper course, in a case like the present, where obviously the question is one of "part and parcel," is to take defence for the lands of A. B., in the possession of the defendants, called in the declaration in ejectment the lands of C. D.]—The following cases in the Queen's Bench seem to sustain the present application: *Murphy, dem. Roberts v. Furlong* (a); *Lessee Elliott v. the Casual Ejector* (b).—[PENNEFATHER, Baron. The latter case was an application, after judgment, to be restored to the possession of the premises. Applications like the present, at one period, were sometimes made in this court, and it was stated that there was some uncertainty in

Where the premises sought to be recovered by an ejectment are described in the declaration by one name, *e. g.*, the lands of A., and the person in possession claims them by another name, *e. g.*, the lands of B., the proper course for such person in possession, who has been served with the summons in ejectment, is to take defence "for the lands of B., in the possession of the defendant, called in the declaration in ejectment the lands of A."

A party cannot rule the lessor of the plaintiff to declare for lands in his possession until he has taken defence.

According to the practice in this country, a party who has been served with an ejectment, and who takes defence

thereto, is deemed to be in possession of the premises sought to be recovered by the ejectment. It is not necessary at the trial to give evidence of his possession.

\* Hilary Term.

(a) 2 H. & B. 548.

(b) Alc. & Nap. 142; and see *Lessee of Tyrrell v. Quinlan*, *id.* 135.

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the practice. The court carefully considered the matter, and came to a determination that the course which I have already pointed out was the one which, under such circumstances, should be adopted by a person in possession served with the ejectment. The plaintiff has a right to call the lands by any name he pleases in his declaration: the defendant cannot oblige the plaintiff to call lands B., which he chooses to call A., insisting that this is their proper name; neither is the person in possession bound to adopt the name given by the plaintiff: he may insist on his own name, and to attain this object ought to take defence for the lands of B., called in the ejectment the lands of A. If, after defence shall have been taken, in the manner I have mentioned, it should be necessary to have the declaration rendered more precise, as I rather think it will not, the parties may then apply to the court.]—We wish the plaintiffs to be estopped from denying that they are proceeding for lands in our possession.

PENNEFATHER, Baron.—The order sought for is unnecessary for this purpose, and improper. According to the practice in this country, a party who has been served with the ejectment, and who takes defence thereto, is deemed to be in possession of the premises sought to be recovered by the ejectment. It is not necessary at the trial to give evidence of his possession.\*

No rule.

\* NOTE.—In England, the practice in this respect, although formerly different, is now the same as in this country. By a general rule of all the English courts, the entering into the consent rule in ejectment has the effect of admitting the defendant to be in possession at the time of the service of the declaration.—See this rule, *Q. B.*, 4 *B. & Ald.* 196; 2 *Chit. Rep.* 375, 379; *C. P.*, 5 *Moore*, 310; 2 *B. & B.* 470; *E.*, 9 *Price*, 299. Before that rule the lessor of the plaintiff, in England, was bound at the trial to

prove the defendant in possession of the premises which he sought to recover, although the defendant had entered into the general rule, if the latter contested his possession: *Goodright dem. Balch v. Rich*, 7 *T. R.* 327: but, according to the practice in this country, the taking of defence for the premises as stated in the declaration, has always been held to amount to an admission, that the defendant is in possession of those premises. See *Murphy d. Roberts v. Furlong*, 2 *H. & B.* 550.

*Tuesday, April 16th.*

## TITHE COMPOSITION—CERTIFICATE, FORM OF.

LODGE v. CREAGHE and others.

Action of debt for five years' tithe composition, due to the plaintiff as rector of the parish of Rathsaran, in the Queen's county. The case was tried before the late Lord Chief Baron, at the sittings after Michaelmas Term, 1837. Besides proof of the plaintiff's induction as clergyman, it was proved that he had acted as the officiating minister of the parish for several years, and as such, had received the tithes, which, it appeared, had not been claimed or demanded by any other person. The defendants were proved to have been in occupation of the lands mentioned in the Applotment Book, and in respect of which the plaintiff sought to recover the composition, during the entire period comprised in the plaintiff's claim. The certificate of composition, produced and proved, was in the following form:—

"We, Peter Roe and Thomas White, commissioners, duly appointed and sworn, under and by virtue of an act made in the 4th year of the reign of King *Geo. 4*, entitled" (stating the title of the act), "to ascertain and fix a true and just composition for all tithes arising, growing, yielded, or payable within the parish of Rathsaran in the Queen's county, do hereby certify, that the true and just amount of composition for all tithes whatsoever, within the said parish, is £130 British currency by the year:—and we do further certify that the average price of wheat, being the corn principally grown in this country for a period of seven years, ending on the 31st December, 1821, is 20s. per barrel."

"Dated this 24th day of April, 1826.

"PETER ROE, } Commis-  
"THOMAS WHITE, } sioners."

Defendants' counsel objected to the certificate, inasmuch as it did not state to whom any portion of the tithe composition was payable, nor did it name or describe the clergyman. The Chief Baron reserved the question as to the validity of the certificate for the court.

An objection was also taken at the trial to the form of the applotment; but the latter objection was not relied upon in the court above:—verdict for the plaintiff.

The Lord Chief Baron reserved liberty to move to have a non-suit entered, if the court should be of opinion that the points saved were in favor of the defendants.

Mr. *Hatchell*, Q. C., for the defendants, now moved to have a non-suit entered pursuant to the reservation at the trial. The certificate is

Where the rector of the parish was the sole claimant of the tithes,—*Held*, that a certificate of the tithe composition under the 4 G. 4, c. 99, s. 25, was sufficiently certain, although it did not name or describe the party to whom such composition, or any portion thereof, was payable.

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clearly defective for the reason assigned at the trial. The 4 G. 4, c. 99. s. 25, requires the commissioners to sign a certificate according to the form in the schedule to that act annexed, which certificate should not only state the amount of composition payable in satisfaction of all tithes in the parish, but should also state "in what proportions such composition shall be paid or divided to or amongst the party or parties entitled to such tithes, or any particular share or proportion of such tithes."—[PENNEFATHER, Baron. Is there any claimant besides the plaintiff? For, as the rector is *prima facie* entitled to the whole of the tithes, he is also entitled to the whole of the composition. The clause of the 25th section, which has been referred to, as well as the form of certificate given in the schedule, apply to those cases only in which the tithes are divisible amongst different claimants.]—Although the tithe may belong to one person only, still that person should be named in the certificate, otherwise it would be necessary to bring in aid matters in *pais* to shew the validity of the certificate. Also by the 35th section of the same statute it is enacted that the assessment or applotment shall state and set forth the proportions in which the composition shall be payable by the occupier or owner of the land, "to and among the several persons entitled to such composition, or any part thereof, according to the certificate therein before mentioned."

THE COURT.—That is substantially the same objection.

Mr. Brewster, Q. C., and Mr. Walter H. Griffith, *contra*.—There is nothing in the form of certificate given in the schedule of the act, to shew that where there is but one party entitled to the tithe that party should be named. It is not necessary that the form of the certificate should be in every case the same, for by the 25th section it may be in "such other form as the nature of the case may require." By the 28th section, is given a power of appealing from the certificate; and by the 31st section it is enacted that the certificate, if unappealed from, shall be "conclusive evidence of the *amount* of such composition." It is remarkable that the statute does not say that the certificate shall be conclusive evidence of the *title* of the party claiming the composition. The law names the rector as the party *prima facie* entitled to the tithes of the parish, 1 *Black Com.* 384, and possession by the receipt of tithes is sufficient evidence of title as rector, *Jones v. Waller* (a). The words of the 25th section are merely directory, *Cassamajor v. Strode* (b); *The King v. The Justices of Leicester* (c).

Mr. James Plunkett, in reply.—As the right to tithe composition is liquidated by statute, the party who seeks to enforce that right must

(a) 1 Jones's Ex. Rep. 300.

(c) 7 B. & Cr. 12.

(b) 5 Sim. 87.

bring himself within the provisions of the statute, per Lord Mansfield, *Rann v. Green* (a).—[PENNEFATHER, B. In that case the question arose upon a variance in the description of a statute which was the very foundation of the action.]—Without the aid of the statute 4 G. 4 c. 99, the plaintiff would have no right to maintain this action. From a collective view of the various sections of that act, it is manifest that the commissioners are supposed to be cognizant of the person to whom the tithe is payable. If the certificate were held good in this case it must be equally so in every other, and then the form given in the schedule would be to a great extent repealed.—[PENNEFATHER, B. By no means, for we are disposed to confine our judgment to the case of a single claimant.]—The enactment in the 25th section uses the word “shall,” which has been held compulsory, *Davison v. Gill* (b), and the commissioners are not at liberty to vary the form given in the schedule at their option, *M. Loughlin v. Galbraith* (c). It is not allowable to travel out of the certificate, for the purpose of either adding to or qualifying it, *Bradshaw, Appellant v. Stannus, Respondent* (d); *Ashe v. Locke* (e).

The COURT.\*—We think upon the whole of this case, that the plaintiff is entitled to judgment. This being the case of a sole claimant, and the presumption of law being that the incumbent is entitled to the tithes, we see nothing in the provisions of the act of parliament, which have been referred to, requiring that in such a case the party to whom the tithe is payable should be named in the certificate. The title of the incumbent to the composition is just as good as his title to the tithes, if he was entitled to the entire tithes before the act was passed, he is equally entitled to the entire composition since. By the tithe composition acts one thing is substituted for another—the tithe composition for the tithe itself; but the former is given to the person who was previously entitled to the latter; the same intendment ought, therefore, to be made in favor of the party claiming the tithe composition as would have been made in favor of the party claiming the tithe. The provisions of the statute relied upon by the defendants’ counsel, have reference to those cases only in which the tithe composition is payable to different persons and in different proportions. We would go the length of holding that a payment of the composition to the present plaintiff would be a protection against the demand of any other claimant, inasmuch as it would be a payment to the person, who, by intendment of law was entitled to the tithes of the parish. For these reasons, we think that the points saved should be ruled with the plaintiff.

(a) Cowp. 476.

(b) 1 East. 71.

(c) 2 H. &amp; B. 533.

(d) 5 Law Rec. 2 Ser. 191.

(e) Craf. &amp; Dix. 14.

\* PENNEFATHER, Baron, and RICHARDS, Baron.



Wednesday, April 17th.

**TITHE COMPOSITION—APLOTMENT, VALIDITY OF—  
DISCONTINUING SUIT, UNDER 1 & 2 Vict. c. 109, s. 1.**

**The Rev. MATHEW PURCELL v. HARDING WIGMORE.**

Where an applotment book stated the quantity of land contained in each of several holdings, and the gross amount of the tithe composition charged thereon respectively, but omitted to specify the *acreable* amount of such composition—*Held*, that the applotment was not therefore invalid.

In an action for tithe composition, where the defendant, previously to the commencement of the action, had promised to pay the debt demanded, and on former occasions had actually paid the composition for the same lands—*Held*, that it was not open to him on the trial to object to the validity of the applotment.

This was an action of debt, for four years' tithe composition, ending on the 1st of November, 1837, payable out of the lands of Ballynona South, in the parish of Dungourney, and county of Cork. The plaintiff claimed as rector. The case had been tried at the Summer Assizes of 1838 (for the county of Cork), before Mr. *Richard Moore, Q. C.* Verdict, for the plaintiff, £129 13s., with liberty to the defendant to move for a non-suit, if the court should think the applotment invalid, and with further liberty to move to reduce the amount of the verdict, if the court should think that, on the evidence, the plaintiff was entitled to charge the defendant for only 82 acres, instead of 253 acres, the quantity for which the plaintiff (at the trial) insisted the defendant was chargeable.

Mr. *S. Coppinger*, for the defendant, had, in Michaelmas term, 1838, obtained a conditional order, according to the liberty reserved at the trial, and the case now came before the court for argument.\*

Mr. *Coppinger*, for the defendant, being asked by the court what was the objection to the applotment, stated, that it did not specify any *acreable* amount as payable out of the lands: that a lump sum was put upon each holding, some of these holdings consisting of 100 acres, or more, and that the defendant was sought to be charged for *portions* of holdings, and that it was therefore impossible to ascertain what sum he owed; that neither the court nor jury had any data from which to form a calculation.

There was then produced an extract from the applotment book, rela-

\* Immediately after reading the conditional order, and before the argument commenced, PENNEFATHER, B., intimated to plaintiff's counsel, that if the court should decide the points saved against the plaintiff, they would not permit him, *after* the argument, to discon-

tinue *without costs*, under the late act (1 & 2 Vict. c. 109).

The plaintiff's counsel having stated that they had made up their minds to argue the points saved, the Court directed the case to be proceeded with.


ting to the lands of Ballynona South.

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|   | Ballynona South.                        | Contents of<br>each<br>Division. | Composition<br>for each<br>Division. |        |
|---|-----------------------------------------|----------------------------------|--------------------------------------|--------|
| 1 | James O'Connor, Esq.                    | A R P<br>142 0 0                 | £ s d<br>10 7 9½                     | No. 1. |
| 2 | Harding Wigmore, Esq.                   | 109 0 0                          | 19 10 10                             | No. 2. |
| 3 | Harding Wigmore, Esq.<br>Mill Quarter } | 47 0 0                           | 5 3 2                                | No. 3. |
| 4 | Thos. Barry and partners                | 107 0 0                          | 10 19 3                              | No. 3. |

This extract, Mr. *Coppinger* contended, proved that the objection he made was well founded, and he referred to the evidence of some of the witnesses for the plaintiff, from which it appeared that the value of the land varied from 1s. to 45s. an acre. The plaintiff, at the trial, sought to charge the defendant for the entire of the holdings, marked Nos. 2, 3 and 4, but he failed to shew that the defendant was liable for the entire of the several holdings, and then the only way in which the jury could award any specific sum was, by assuming that each acre in each of the respective holdings was chargeable with the same amount of composition. The evidence of the witnesses proved that this assumption was unfounded, and therefore the applotment, not affording any criterion for determining the acreable value, it was not framed in the manner required by the 34th section of the 4 G. 4, c. 99, and was altogether invalid. The plaintiff was not without remedy in this case, for he might procure a new applotment, or he might recover according to the Parish cess or the Grand Jury rates.—[PENNEFATHER, Baron. Was not such a defect as you are describing the subject-matter of appeal to the Quarter Sessions?—The applotment was altogether invalid, and no appeal could be had in such a case: the objection is not that some lands had been applotted too high, and others too low, which would properly be the subject-matter of appeal; but the objection is, that it is impossible to state what the acreable amount is. The learned Judge, in this case, directed the jury to find that the defendant was liable for 82 acres, at a certain acreable rate, although these 82 acres were made up of part of No. 4 and part of No. 3, and these two Nos. are assessed at different acreable rates; and, in like manner, the jury were directed to find the defendant liable for 62 acres, being *part* of No. 4, and the jury were obliged to take it for granted that each acre of the 107 acres in No. 4 was to pay the same rate.

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CHIEF BARON.—We certainly do feel considerable difficulty in understanding how the jury made up their verdict in this case, and we wish to hear the counsel on the other side.

Mr. *Collins*, Q. C., and Mr. *O'Leary*, for the plaintiff.—In the extract sent up to the court there are four holdings, under the denomination of Ballynona South. The holding marked No. 1, has nothing to do with this case. The plaintiff sought to charge the defendant, Wigmore, for the composition payable out of the *entire* of Nos. 2, 3 and 4. As to No. 2, there is no difficulty, for it was proved at the trial that the entire of that holding, containing 109 acres, was occupied, since 1832, by Henry Wigmore, the defendant's son, as a tenant from year to year to his father, the defendant, so the defendant was clearly liable for the *entire* of the composition payable out of that holding. Then, as to No. 4 (the 107 acres), the case stands thus: it was proved, as appears by the Judge's certificate, that one Duggan occupied about 62 acres of this holding, as a yearly tenant to the defendant.—[COURT. What became of the remaining part of that holding, and how can you say what ought to be charged for the 62 acres occupied by Duggan?—The remaining part, namely, 45 acres of No. 4, was demised for a term of three lives, on the 19th of December, 1835, by the defendant, to Arthur Ormsby, as appears by the Judge's certificate, and Ormsby had been in possession from March, 1832, until 1835, as tenant from year to year to the defendant; and thus the defendant became liable for the entire of Nos. 4 and 3. The demise to Ormsby was of 82 acres, made up of the 45 acres of No. 4, and about 37 acres of No. 3, and then there remains only about 10 acres of No. 3 to be accounted for, and these 10 acres had also been demised since August, 1832, by the defendant to a tenant, who actually produced his lease at the trial, but the attesting witness was not present, and so the lease was not proved, and therefore the jury were directed not to take these 10 acres of No. 3 into account at all, and thus the defendant has been charged for 253 acres, viz., the 109, the 107, and 37 out of the 47 in No. 3.—[PENNEFATHER, Baron. Then, as to the 37 acres, how did the jury fix the amount payable for them?—They found the entire holding assessed at the gross sum of £5. 3s. 2d., which was just 2s. 2d. and a small fraction per acre, and they charged the defendant at that rate.—[COURT. That is the difficulty we feel: what ground was there for presuming that each acre in any one of the three holdings was intended by the commissioner to be rated at the same acreable sum?—That intention appears from an inspection of the extract: the commissioner evidently treated the four holdings as differing in quality and acreable value each from the other: this appears by comparing the gross sums, and the number of acres opposite to each sum. They have distinguished No. 2 from No. 3, charging different average

acreable rates, although both numbers are set down in the applotment book as in the ownership of the same individual, Harding Wigmore: besides it appears, from the Judge's certificate, that up to the year 1831 the defendant actually paid the composition for these very lands, and also, shortly before the commencement of the action, the defendant wrote a letter to the plaintiff's attorney, promising to pay the debt, which letter was read at the trial.

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CHIEF BARON.—We think the applotment book affords sufficient evidence that the commissioners had divided this denomination of land according to its different qualities, and that they meant that the gross sum put on the holding should be payable at an equable acreable rate, and so we think the applotment is not invalid on the ground suggested: upon the other grounds also, namely, that the defendant has promised to pay this debt, and that he has actually paid the composition on former occasions, we think it was not open to make this defence at the trial.

Allow the cause against making absolute the conditional order, and let the plaintiff have the costs of this motion.\*

\* See *O'Leary's Law of Tithe Rent-charges*. c. viii. s. 6; and cases in the note to p. 190, *ibid*.

### NISI PRIUS SITTINGS.

BEFORE RICHARDS, BARON.

#### ATTORNEY'S BILL OF COSTS—WHEN TAXABLE— WARRANT OF ATTORNEY—NON-SUIT.

DUNNE v. TIERNEY.

This was an action brought by the plaintiff, an attorney, to recover a sum of £67, the amount of a bill of costs. The charges in the bill were altogether for conveyancing, with the exception of one item which was for "drawing a bond and warrant." The bill had not been served pursuant to the statute.

Mr. Fitzgibbon and Mr. J. D. Fitzgerald, for the defendant, submitted that the plaintiff should be non-suited, inasmuch as he had not proved a service of the bill of costs, pursuant to the statute. If in a bill of costs there is a single taxable item, the whole of the bill becomes taxable, *Hill*

Where a bill of costs was for conveyancing, with the exception of one item which was for the "drawing of a bond and warrant,"—*Held*, that the "warrant" being a taxable item, subjected the whole bill to taxation; and therefore, in an action on such a bill

which has not been served pursuant to the statute, the plaintiff will be non-suited.

Where in an action by an attorney for costs, it appeared that at the time of the business being done he had a partner: *Held*, that the non-joinder of the partner as a co-plaintiff, was a ground of non-suit.

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v. *Humphreys* (a). In the present bill there is one taxable item, namely "the preparing the warrant," and in as much as the bill has not been served the plaintiff must be non-suited, *Wild v. Crawford* (b); *Findon v. Bourn* (c); *James v. Child* (d); *Wilson v. Gutteridge* (e).

Mr. *Brewster*, Q.C., and Mr. *H. Martley*, for the plaintiff, contended that the cases cited did not apply. Those cases arose in England, where the "warrant" is a different instrument from the one mentioned in the present case. There, it is the instrument authorising an attorney to commence or defend an action; but here, it does not appear what the "warrant" mentioned in the bill of costs was for.

Mr. *Fitzgerald*.—The character of the "warrant" in this case sufficiently appears from the charge in the bill. It is the usual warrant attached to a bond, and is in its nature a plea of confession. It empowers an attorney to appear for the obligor in the bond, and confess a judgment against him. It is an instrument executed with the view of a proceeding to be taken in court.

RICHARDS, B.—I feel coerced by the authorities relied upon by counsel for the defendant; but if the plaintiff's counsel wish it, I will let the case go to the jury subject to the point.

It, however, subsequently appearing that the plaintiff had a partner at the time the business mentioned in the bill of costs was doing, the defendant's counsel insisted that the latter should have been a co-plaintiff; and that the non-joinder of a co-plaintiff was a ground of non-suit, *Eccleston v. Clessam* (f); *Cahill v. Vaughan* (g). Whereupon,

The plaintiff was non-suited.

(a) 2 Bos. & Pul. 343.

(b) 2 Stark. 338.

(c) 4 Campb. 68.

(d) 2 Crom. & Jer. 678; S. C. 2 Tyr. 732.

(e) 4 D. & R. 736.

(f) 1 Wms. Saund. 154 in notes.

(g) Ib. 291 b. n. 4.

## QUEEN'S BENCH.

Friday, May 24th.

## PLEADING—SPECIAL DEMURRER—NEW FORMS IN ASSUMPSIT.

MILLS v. BAMFIELD.

ASSUMPSIT.—The declaration in this case contained, first, a count upon a bill of exchange, in the usual form, against the defendant, as acceptor of the bill; two other counts against the defendant as the drawer of two other bills: these counts merely stated the facts as to the drawing and accepting of these bills, and did not aver any promise or undertaking on the part of the defendant to pay them: there was then a fourth count, commencing, "whereas, also," and alleging that the defendant was indebted to the plaintiff in a certain sum, for "money lent," and in so much for "goods sold and delivered," "money paid," &c., and concluded thus, "and therefore the said defendant, afterwards, &c., at, &c., in consideration of the *last-mentioned* several premises respectively, then and there promised to pay the said last-mentioned several monies, respectively, to the said plaintiff, on request, yet he hath disregarded his said last-mentioned several promises, and hath not paid any of the monies, or any part thereof, to the said plaintiff's damage of £300," &c. The defendant pleaded *non assumpsit* to the first and last counts of the declaration, and demurred to the second and third counts, and assigned the following causes of demurrer: first, that in the second and third counts it is not averred that the defendant made any promise or undertaking to the defendant; second, that it is not averred that he promised or undertook to pay the said bills of exchange mentioned therein; third, that the plaintiff having declared against the defendant in an action of trespass on the case, on promises, in the first and last counts, does not, in the third count, aver any promise to have been made by the defendant, and yet he joins and unites the said third count in the said pleading or declaration with the said first and last counts; fourth, a similar cause, for joining the second count with the first and last; fifth, that in the breach it is averred that the defendant has not paid any of the said monies in the said declaration mentioned, or any part thereof, and yet the plaintiff hath not averred that the defendant undertook or promised to pay the monies in the second and third counts respectively mentioned, or any part thereof.

Where in assumpsit there were three special counts in the declaration on bills of exchange; the first count being against the defendant as acceptor of a bill; and the second and third as drawer of two other bills; and then the common counts; and the first count contained the usual promise to pay, according to the tenor, &c.; and no promise was stated in either the second or third; and the general conclusion contained the words "last-mentioned;" *Held*—on special demurrer to the second and third counts, for not averring a promise, that the general promise in the conclusion extended to these counts, notwithstanding the words "last-mentioned."

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Mr. *James Robinson*, with whom was Mr. *Baker*, for the demurrer.— This is an action of assumpsit, and any of the counts which are without a formal allegation of a promise are certainly bad, at least on special demurrer: 1 *Chit. on Plead.* 6th ed. 301, and that promise must be alike alleged in pleading, whether it be expressed or implied: 1 *Chit. on Plead.* 6th ed. 302. This position is illustrated in several modern cases: *Harding v. Hibel* (a): *Henry v. Burbidge* (b): *Griffith v. Roxbrough*, (c) is likewise an authority for us: that was a motion in arrest of judgment, and was decided expressly on the authority of *Starkey v. Cheeseman* (d); and although Alderson, B., is reported to have expressed some doubts as to the validity of the objection, those doubts he expressly said had reference to the new system of pleading adopted in England, under which it is not competent for a defendant, in a similar cause of action, to plead non assumpsit. It may be contended that admitting a promise to be essential, the second and third counts are covered by the promise in the general conclusion, and on this point *Barnes v. Keily* (e) may be cited as an authority for us: in it there was but one count, and it clearly established what we now contend for, that the words in the general conclusion, "last-mentioned several monies" mean the several sums of money in the last count of the declaration mentioned; and Joy, C. B., intimated, in his judgment, that the extension or restriction of those words depended on the mode in which the pleader framed his declaration. The General Rules of Hilary term, 1832, give no forms applicable to the present case: they only contemplate the case of a declaration against the drawer of a bill, or indorser of a note, where the promise, in the general conclusion, without the words "last-mentioned," is applicable to the entire declaration, and where it may be necessary to have one or more counts against the acceptor of a bill or maker of a note, in which case it is suggested they should be placed first, and the words "last-mentioned" introduced into the general conclusion. This demonstrates that "last-mentioned several monies" does not include all the counts, but the first, for it is evident that if there were two counts against an acceptor, and the words "last-mentioned" in the general conclusion, there would, according to an opposite construction, be a double promise to the second count, to pay, according to the tenor and effect of the acceptance, and on request, and the general rules would be rendered absurd.

Messrs. *Brooke*, Q. C., and *Montgomery*, *contra*, contended that the form of the pleading in this case was in strict conformity with the forms given in the General Rules of 1832, and the directions annexed to them. In *Hennell's Forms*, 72, he states, that when there are counts against the

(a) 4 Twyr. 314.

(b) 4 Scott, 296, S. C.; 3 Bing. N. C. 501.

(c) 2 Mee. &amp; W. 734.

(d) 1 Salk. 128.

(e) C. &amp; Dix, 358.

defendant, as acceptor, and also as drawer or indorser, that the words "last-mentioned" are indefinite in their application. It was absolutely necessary, in the present case, to introduce the words "last-mentioned," the first count being against the defendant as acceptor, and the whole effect of them is to restrict the promise in the conclusion to all the counts but the first. In *Chevers v. Parkington* (a), where this precise objection was raised, by special demurrer, the court set aside the demurrer as frivolous. It is admitted that the promise in the conclusion extends to all the money counts, although they are all separate and distinct counts: *Jourdain v. Johnson* (b).

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Mr. Baker replied.—Although the words "last-mentioned" apply to the several sums in the money counts, yet there is no authority for saying that they can be extended beyond those sums; and the reason is, that those several sums are included in the one count; and the test, as to the commencement of a new count, being the employment of the technical words, "whereas, also." The case of *Harding v. Hibell* establishes, first, that the parts of the declaration commencing with "whereas, also," are distinct counts; and, secondly, that the words "last-mentioned" confine the promise in the conclusion to the last count. The case of *Starkey v. Cheeseman*, where it was held that it was not necessary to aver a promise to pay in a count against the drawer, was decided after verdict, and the fact omitted in the declaration had been proved at the trial; and in *Henry v. Burbidge* it was expressly held, that it was necessary to aver a promise to pay, although *Starkey v. Cheeseman* was cited in that case. In *Boyce v. Williams*\* the court of Exchequer decided in the same way.—[BURTON, J. The question turns upon the words "several promises" in the conclusion; these cannot apply to the sums in one count, to which there would be but one promise.]—There are several sums and several distinct causes of action alleged in that count. With respect to the reliance which has been placed upon the rules of court, their authority has been overruled in *Griffith v. Roxbrough*, and one of the forms held bad in arrest of judgment.—[CRAMPTON, J. If the promise in the conclusion was averred to second, third and subsequent counts?—That would be

(a) 6 Dowl. P. C. 75.

(b) 2 Cr. M. & R. 564.

\* This case was argued in the Exchequer, in Trinity term, 1837. It was an action in assumpsit, for goods sold and delivered. The declaration contained a count for the goods sold and delivered, and the money counts; the latter commencing "And whereas also."—The words "last-mentioned seve-

ral monies" occurred in the conclusion. A demurrer was taken to the entire declaration; Held bad, as being too large; the court admitting, that if the demurrer was confined to the first count, it would be bad, there being no promise to that count.



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within the rule — [CRAMPTON, J. The word in this case is promises, as if it were intended to extend the promises beyond the last count.] — The meaning of these words is this, a promise to pay the several different sums mentioned in the last count. — [PERRIN, J. You must contend that the promise extends to five sums, but does not to seven.] — Because the five sums are in one count, whereas the other two are in separate and distinct counts, to which the promise, in the conclusion, is prevented from extending, by the operation of the words "last-mentioned."

*Wednesday, June 5th.*

BUSHE, C. J.—The question, in this case, turns principally upon the construction of the New Rules, and the schedule attached to them. The plaintiff declares against the defendant as acceptor of a bill of exchange in the first count, and states a promise to pay according to the tenor and effect thereof; in the second and third counts he sues the defendant as the drawer of certain bills of exchange, and he does not aver any promise in these counts. There is then a consolidated count, in which the plaintiff declares against the defendant for several money demands, and that count concludes in these words: "and therefore the said defendant, afterwards, &c., in consideration of the last-mentioned several promises, respectively, then and there promised to pay the said last-mentioned several monies, respectively, to the plaintiff," &c. The defendant's counsel have relied altogether upon the words "promised to pay the last-mentioned several sums," &c., and have argued that the promise is confined to the consolidated sum in the money counts, leaving the second and third count without any promise. We consider that that inference is unsustained, when we look at these rules, and consider that the object of them was to shorten the pleadings, and save expense. The rules provide, in this respect, for the case of an action on the money counts, the plaintiff having merely to state his several causes of action, and then, in the conclusion, stating a general assumpsit or undertaking and breach, and this would have been sufficient if the action had been upon the money counts, merely; but when the cause of action is founded upon a bill of exchange, as well as upon money demands, then, in the case of an acceptor, in the form given under these rules, the count upon the bill contains a promise to pay according to the tenor and effect thereof; but if the defendant is sued upon a bill in any other character than as acceptor, then the forms merely contain the facts which give a cause of action: they state no promise, being, in fact, put upon the same footing as the money counts. The rules and schedule then proceed to shew when both classes of action may be joined in one declaration, and it directs, that when the declaration contains one or more counts against the maker of a note or the acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then, in the general conclu-

sion, to say, "promised to pay the said last-mentioned several monies, respectively;" introducing, for the first time, the words "last-mentioned." If there was no cause of action against the defendant, except as acceptor and upon the money counts, the declaration would be unexceptionable; but the present objection grows out of this, that the defendant is sued as acceptor in one count, and in two others as drawer, of certain bills of exchange, and the latter counts are in the abridged form prescribed by the rules. When there is a count upon a bill of exchange against the defendant as acceptor, he is directed to introduce the words "last-mentioned" into the general conclusion, to prevent the promise in that count from extending to the first count, and therefore the words "last-mentioned," were, by the New Rules, only intended to exclude such a case, and that therefore the general promise, in the conclusion, applies as much to the second and third count as to the last. Let us suppose that the first count was expunged, then there would be no meaning in the words "last-mentioned:" the use of the words "last-mentioned" is to cut off the promise from the count against the acceptor, and if these words had not been introduced, there would have been a double set of promises to the first count of the declaration; and being introduced only for the purpose of preventing a double promise to the count against the defendant, as acceptor, we are of opinion that the demurrer in this case must be overruled.

Demurrer overruled.

5th, 7th, and 10th of June.

**BILLS OF EXCHANGE—ACTION AGAINST INDORSER—  
EVIDENCE—NOTICE OF DISHONOR—WAIVER OF.**

**BRUSH v. HAYES.**

**ASSUMPSIT** on a bill of exchange for £138. 1s. 2d., drawn the 24th November, 1836, by John O'Brien on Mary O'Brien, payable three months after date. In an action against the indorser of a bill of exchange,

the following notice of dishonor was given in evidence, "Take notice that J. B.'s draft on M. O'Brien, due yesterday, amount £138 : 1 : 2, on which you are an indorser, has not been paid:"—it was also proved that the defendant, after he had been arrested at the plaintiff's suit, voluntarily wrote a letter to the plaintiff's attorney, in which this passage occurs:—"I propose, out of my industry to pay your client £20 a-year, until the principal be fully discharged; I have no money to pay any costs:"—he subsequently offered securities for the debt, stating that if acceded to, they would give him his liberty: these offers were entertained on the plaintiff's part, and the negotiation was subsequently broken off, in consequence of the defendant's non-performance of some of the conditions agreed on: objections were taken at the trial—first, to the sufficiency of the notice of dishonor; and secondly, to the admissibility in evidence of these offers, being made while a compromise was pending, and also when the defendant was under arrest: and it was contended on behalf of the plaintiff—first, that the notice was sufficient; and secondly, that if insufficient, the defendant had waived all objection on that ground, by the subsequent offers to pay the bill:—*Held*, that the evidence was properly received. *Held also*, that the acts of the defendant, subsequent to his arrest, amounted to evidence of a waiver of the want of notice of dishonor. *Seem*—that the notice was insufficient, it not containing any statement from which it would appear, by necessary implication, that the bill had been dishonored.

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months after date, to the order of the said John O'Brien, indorsed by him to the defendant, and by the defendant to the plaintiff. At the trial, which was had before CRAMPTON, J., during the sittings after Easter term, it appeared in evidence that the bill when dishonored was not protested; but it was proved that the day after the bill fell due, the following notice was served on the defendant:—

"Sir,

"Please to take notice, that John O'Brien's draft on Mary O'Brien, due yesterday, the 27th inst., amount £138. 1s. 2d., on which you are an indorser, has not been paid.

"I am, &c.,

"28th Feb. 1837.

"EDWARD BRUSH."

It was also proved on the part of the plaintiff, that on the 1st March, 1837, the drawer and acceptor, who were further indebted to the plaintiff, executed a joint bond and warrant for a larger sum, in which the amount of the bill was expressly included: an arrangement proposed by the defendant, who himself prepared the bond and attested its execution. Judgment was afterwards entered upon the bond, and execution issued at the instance of the defendant, who informed plaintiff's attorney that if he did not issue execution on the judgment, other creditors of the conuzors would sweep away all their effects: a sum of £——— was levied, and paid to the plaintiff, who immediately handed over out of it, to the defendant, £28, for which he took his promissory note. After the defendant had been arrested at the suit of the plaintiff in this action, he wrote the following letter to the plaintiff's attorney:—

"Sheriffs' Prison, 30th July, 1838.

"Sir,

"Having no property but my liberty, I propose, out of my industry to pay your client £20 per year, until the principal be fully discharged; never having received any value.—Should any business come through your office or your client, I will allow one-half to go in discharge of the next coming bills, as it may be equal to payment of: I have no money to pay any costs.

I am, sir,

"To E. M——, esq.

"WILLIAM HAYES."

A memorandum without a date, but proved to have been subsequent to the foregoing letter, was afterwards handed by the defendant's wife to the plaintiff's attorney; it was in the defendant's hand-writing, and as follows:—"Let the bond be filled, and signed by William Hayes, and an undertaking given by Mr. M—— (plaintiff's attorney), that provided the insurance be effected within a month or two, no proceeding should be instituted upon it: this would give Hayes his liberty,

"and enable him to effect the object sought for."—It appeared that the bond and insurance mentioned in this memorandum, were securities which the defendant had offered to give for the debt he owed the plaintiff, and that the negotiation was afterwards broken off in consequence of Hayes's non-performance of some of the preliminary conditions agreed upon. The defendant's proposals subsequent to his arrest, were made, as the plaintiff's attorney expressed it in giving his evidence, "with a view to a compromise, not a compromise of the plaintiff's demand; but a compromise by which the defendant might get time for the payment of the plaintiff's demand." They all originated with the defendant himself, and were not drawn from him by any solicitation or application on the part of the plaintiff or his attorney.

His Lordship left it to the jury, to determine whether the defendant had assented to the plaintiff's taking, from the other parties to the bill, the fresh security of their bond and warrant, on the understanding that *he* was to be thereby exonerated; directing them, in case they were of opinion that there was no such understanding, to find for the plaintiff—deducting from the amount of the bill the sum levied under the execution against the other parties: at the same time, he reserved to the defendant liberty to move to enter a non-suit, if the court above should be of opinion that the notice of the 28th Feb. 1837, was not a sufficient notice of the dishonor of the bill; and that the letter of the 30th July, 1838, and the subsequent memorandum, were not admissible as, or did not amount to, evidence of a waiver, on the defendant's part, of his discharge by want of notice. The jury gave a verdict for the plaintiff, for £ ———.

Mr. *Macdonagh* having early in this term obtained a conditional order for a new trial—

Mr. *Hatchell*, Q. C., with whom were Messrs. *O'Callaghan* and *Lewis*, now shewed cause. The grounds on which the verdict for the plaintiff is sought to be set aside are these:—that the notice of the non-payment of the bill, which was proved to have been served on the defendant the day after the bill became due, was not a sufficient notice of dishonor; and that supposing it was not, and that by reason of its insufficiency the defendant was discharged from his liability as indorser of the bill, the defendant's letter of the 30th July, 1838, nor the undated memorandum subsequently written by him, was a waiver of such discharge; as any promise that either contained was a promise made in the course of a treaty for a compromise. Now, as to the first question—the insufficiency of the notice of dishonor,—in the early cases on this subject, and indeed until very recently, notices far less particular than this were held sufficient: it would appear indeed, that the court of Common

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Pleas in England have lately gone a great way towards requiring a notice almost as precise as a formal protest; but in one very recent case, the court of Queen's Bench has decided for the sufficiency of a notice similar to the one which the court of Common Pleas declared to be insufficient: and the Barons of the Exchequer, in another, have stated that they will not be bound by the decision in the Common Pleas. Indeed, in the last case of the kind that came before the latter court, the Judges seem to have regretted their former decision, or to be disposed to reconsider it. From the time that *Tindal v. Brown* (a) was decided, it was generally thought that a demand of payment, on the part of the holder, was a sufficient notice of dishonor, until by the decision in *Hartley v. Case* (b), the court of Queen's Bench determined that it was not. The latter case will be relied on at the other side, but it is not at all like the present: what was there relied on as a notice of dishonor was a mere demand of payment. In that case, Abbott, C. J., said, that "no precise form of words was necessary in giving notice of the "dishonor of a bill; but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. The next case on the subject was *Solarte v. Palmer* (c) which went to the House of Lords: but in that case also, the notice was nothing more than a demand of payment; and the decision went to this, that the notice should inform the party, either in express terms or by necessary implication, that the bill was dishonored. But the case on which, on the part of the defendant, the greatest reliance will be placed is *Boulton v. Welsh* (d): in this case the two previous cases were relied on, and governed the decision in that case; and all the Judges lamented the decision to which they were obliged to come.—[BURTON, J., The notice in the present case does not state presentment for payment.]—It does, by necessary implication.—[BURTON, J. Although it may afford some presumption, it does not follow by necessary implication.]—Lord Eldon, in *Wilkinson v. Adam* (e), said, "necessary implication means not natural necessity, but so strong a probability that an "intention contrary to that which is imputed cannot be supposed." *Boulton v. Welsh* was decided in Easter term, 1837; and in the same term, the court of Queen's Bench decided *Grugeon v. Smith* (f), although the cases upon which the court of Common Pleas decided that case were all relied on; and in that case there was nothing in the notice, of the bill having been dishonored. And in *Hedger v. Steavenson* (g) in the following term, a similar notice was held sufficient.—[BURTON, J. In *Grugeon v. Smith* there is a statement that the bill was returned with charges; and in *Hedger v. Steavenson* that it was returned with

(a) 1 T. R. 167.

(b) 4 B. &amp; C. 339.

(c) 7 Bing. 530; S. C. 5 Moo. &amp; P. 475; and 8 Bli. N. S. 874; and 2 Cl. &amp; F. P. C. 93.

(d) 3 Bing. N. C. 688.

(e) 2 Ves. &amp; B. 466.

(f) 6 Ad. &amp; E. 499.

(g) 2 Mee. &amp; W. 799.

noting.]—Parke, B., expressly disdains going into that distinction, but all the Judges impugned the authority *Boulton v. Welsh*; and they pronounced their decision on the principle, that no mercantile man on reading the notice could misunderstand it. The second ground, upon which the verdict must stand, even if the notice be open to the objection that has been taken, is—that the defendant, by his subsequent acts, waived that objection. A payment on account of a bill by indorsee, and a promise to pay is a waiver of want of notice, or an admission of regularity. A party who makes a communication, guarding it to be without prejudice, will not be bound by it; but where a party has paid any part of the money, or promises to pay after the bill becomes due, notice of dishonor will be dispensed with, such acts being held to be admissions of the defendant's liability; *Hill v. Elliott* (a): *Dixon v. Elliott* (b). It will not be necessary to give judgment upon the first part, if the court should be of opinion that the acts of the defendant, subsequent to his arrest, dispensed with the notice of dishonor.

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Messrs. *Macdonagh* and *Whiteside*, contra.—If *Boulton v. Welsh* be law, it must rule this case: the decision in that case goes further than it will be necessary to go in the present case. In *Hartley v. Case*, Abbott, J. says, “the language must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor.” In *Solarte v. Palmer*, Tindal, C. J., says, “the notice should convey an intimation to the party to whom it is addressed, that the bill is in fact dishonored.” The case of *Boulton v. Welsh* cannot be distinguished from the present: *Solarte v. Palmer* might, although there is no real difference between them. The case of *Grudgeon v. Smith* was rightly decided, because the words “returned with charges” occurred in the notice in that case, which could not occur unless the bill had been dishonored: it does not therefore conflict with *Boulton v. Welsh*. The case of *Hedger v. Steavenson*, so far from supporting the plaintiff's case, is against it, for the court recognised the authority of the cases upon which we rely; and Parke, J., in reference to the words “necessary implication,” referred to the case of *Wilkinson v. Adam* (c), where Lord Eldon said that “necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed cannot be supposed.” The case of *Hedger v. Steavenson* was brought under the consideration of the court in *Houlditch v. Cauty* (d), as overruling *Boulton v. Walsh*, but Tindal, C. J., said, “he saw no reason for saying the judgment in *Boulton v. Welsh* is not law: it has gone the full length of *Solarte v. Palmer*,

(a) 5 C. &amp; P. 436.

(c) 1 Ves. &amp; B. 466.

(b) 5 C. &amp; P. 437.

(d) 4 Bing. N. C. 411.

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"but it has not exceeded that case." If the court should overrule *Boulton v. Welsh*, the case of *Phillips v. Gould* (a), which is the latest authority on this subject, is so similar to the present as that it must govern it. *Hedger v. Steavenson* is also distinguishable from the present case, it being an action against a drawer and not an indorser. If the notice be bad, there is no notice; and then the court will have to consider the second ground upon which the plaintiff relies, which is this, that the defendant, by a subsequent offer which he made to pay the bill, waived any objection as to the want of the notice of dishonor. In *Rouse v. Redwood* (b) it was held, that an admission by an indorser, when he was arrested, and ignorant whether he was bound by law to pay, was not binding. In *Waldridge v. Kennison* (c) Lord Kenyon lays this rule down, "any admission or confession made by the party respecting the subject matter of the action while a treaty was depending, under faith of it, and into which a party might have been led by the confidence of a compromise taking place, could not be admitted to be given in evidence to his prejudice." In *Gregory v. Howard* (d) his Lordship says, "evidence of concessions, made for the purpose of settling matters in dispute, I will never admit." The offer which the defendant made in the present case is within both these rules: there is no distinction in this respect between verbal and written communications: *Cory v. Bretton* (e). In *Cuming v. French* (f) the defendant, who was the drawer of a bill of exchange, having been arrested, said, "I am willing to give my bill at two months;" and Lord Ellenborough held that such an offer was no evidence of a waiver, and did not obviate the necessity of expressly proving notice of the dishonor of the bill. In *Donnelly v. Howie* (g) it was held, that the promise to pay the bill, by the indorser, does not dispense with the due presentment for payment, and notice of dishonor, unless made with full knowledge of all the circumstances; and in that case the Lord Chief Baron said, "it would be well that the law should be brought back to what it was before these new-fangled notions of waiver had been introduced." In that case the question of whether the defendant had or had not full knowledge of all the circumstances, was left to the jury; and in *Leaf v. Gibbs* (h) the same course was adopted under similar circumstances; Tindal, C. J., saying, "the defendant might not be informed of his strict, legal right." In the present case, if the plaintiff meant to rely upon a waiver, a question should also have been left to the jury, as to whether when he did those acts, which it is contended amount to a waiver, he had full knowledge of his legal rights; and no such question having been left to them,

(a) 8 C. &amp; P. 555.

(c) 1 Esp. 143.

(e) 4 C. &amp; P. 462.

(g) 2 Law Rec. N. S. 179.

(b) 1 Esp. 155.

(d) 3 Esp. 113.

(f) 2 Camp. 106, *in notis*.

(h) 4 C. &amp; P. 466.

the plaintiff cannot now rely upon a waiver. In *Standage v. Creighton*(a) evidence of an offer to pay a part of the bill, and secure the residue by warrant of attorney, was held insufficient to dispense with proof of the notice of dishonor. The same principle has been acted upon in *Baker v. Birch*(b), and in *Fletcher v. Froggatt*(c). There are on this subject three other most important cases: the first is *Borradaile v. Lowe*(d), in which Lord Mansfield lays it down that a promise, to be binding upon an indorser, must be an "absolute promise to pay at all events," or a promise made when he had full knowledge at the time that he was discharged. In *Pickin v. Graham*(e) a distinct promise to pay the bill did not dispense with the notice of dishonor, and the court decided the case upon the authority of *Borradaile v. Lowe*; and Vaughan, B., says, "the promise was not an express absolute and unconditional promise." It cannot be argued that in this case the promise was express, absolute and unconditional; it was a promise made during a compromise by a prisoner seeking to obtain his liberty, and saying he could not pay the costs of the proceedings. The condition of his promise was his release from prison without paying costs. In *Hicks v. Beaufort*(f), where the drawer of a bill, after it became due, said, "if the acceptor does not pay, I must," this was held not to be conclusive evidence that the defendant had received a waiver notice of dishonor of the bill; and Tindal, C. J., said that "where the drawer distinctly promises to pay the bill, it is evidence from which it may be inferred he received notice of the dishonor: it was entirely a jury question." So we contend was the question of waiver in the present case, and if the plaintiff meant to rely upon that ground, he should have had the question left to the jury. The cases of *Blesard v. Hirst*(g), *Goodall v. Dolley*(h), and *Beauchamp v. Cash*(i), were also relied on.

Mr. O'Callaghan.—I admit, if *Boulton v. Welsh* be law, I cannot contend for the sufficiency of the notice in the present case; but considering *Boulton v. Welsh* as conflicting with *Hedger v. Steavenson*, it will be for the court to consider how far the decisions in *Hartley v. Case*, and *Solarte v. Palmer*, rule this case. In *Hedger v. Steavenson*, the Judges all condemn the decision in *Boulton v. Welsh*. In *Phillips v. Gould*, the notice did not come exactly in question, and if the court in that case decided that the notice was bad, I should admit it would rule the present case. In *Houlditch v. Cauty*, Tindal, C. J., said, "he was ready to re-consider *Boulton v. Welsh*, but adheres to the case of *Solarte v.*

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(a) 5 C. &amp; P. 406.

(e) 2 C. &amp; P. 569.

(c) 1 Cr. &amp; Mee. 725; S. C. 3 Tyr. 923.

(i) 5 Burr. 270.

(b) 3 Camp. 107.

(d) 4 Taun. 93.

(f) 4 Bing. N. C. 229.

(h) 1 T. R. 712.

(t) 2 D. &amp; Ry. App. 3.



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*Palmer*, and thus far, only, I call upon the court to go, because if this case is decided upon the authority of *Solarte v. Palmer* the verdict must stand. In *Hartley v. Case*, and *Solarte v. Palmer*, the documents relied on as notices of dishonor, might as well have been notices of actions; from neither of them could it be said, by necessary implication, that the bill was dishonored. To presume that the bill, in the present case, was not dishonored, is to suppose that the plaintiff did a wrongful act, in demanding from the indorser what he was not liable to pay.—[CRAMP-  
TON, J. In the present case the notice is a notice of dishonor, or nothing at all.]—In *Hedger v. Steavenson*, Parke, B., said, by the decision in *Solarte v. Palmer* “we are bound, though I am not prepared to say, “that I am bound by all the reasoning of the learned Judges in giving “their opinion; and, therefore, should myself doubt whether we could “go so far as to say that it ought to appear upon the face of the instru-  
“ment, by express and necessary implication, that the bill was presented “and dishonored: it seems to me enough if it appear by reasonable in-  
“tendment for necessary implication.” *Solarte v. Palmer*, and *Hartley v. Case*, could not be supported on that ground, while the present case could; and *Boulton v. Welsh* was decided solely upon the authority of *Solarte v. Palmer*; and the language used by Lord Brougham, in giving judgment in latter case, surprised the profession. *Byles on Bills*(a). These three cases are distinguishable from the present case, and no person receiving the notice which the plaintiff relies on could have any doubt of its meaning. As to the second point, we contend that if the notice of dishonor was insufficient, that the letter of the defendant was a distinct waiver of that objection. As to the offer being made by way of compromise, the evidence is that the compromise sought was not a compromise of the plaintiff's demand; but a compromise to get time to pay the plaintiff's demand: it was voluntary, and originated with the defendant, when there was no treaty pending, and therefore the case of *Cuming v. French*, and similar cases relied on, do not apply. In *Cory v. Bretton*(b) the letter of the defendant was held not to be evidence, because it was guarded by an express stipulation that it was not to be used on any future occasion to his prejudice; but that decision proves that if the letter had not been so guarded, it would have been received: the distinctions are accurately stated in *Phil. on Ev.* 4 ed., 365, 6, 7. In *Nicholson v. Smith*(c), and *Wallace v. Small*(d), such offers have been received, not being expressed to be without prejudice. In *Margetson v. Aitkin*(e), and *Dixon v. Elliott*, the offer, by an indorser of a bill, to pay so much in the pound, was admitted in evidence

(a) 3d ed. 178.

(b) 4 C. &amp; P. 462.

(c) 3 Stark. N. C. 128.

(d) Moo. &amp; M. 446.

(e) 3 C. &amp; P. 338.

and held to dispense with the necessity of proving the notice of dishonor of the bill; and in *Hill v. Elliott*, where the party was in prison when a similar offer was made, evidence of it was received. The observations of Lord Kenyon, in *Rouse v. Redwood*, do not apply to such an offer as that made by the present defendant; but to an offer or observations made at the moment of the arrest. In *Hopley v. Dufresne* (a) an application for further time for payment, after declaration filed, in which presentment was averred, was held to be evidence of a waiver of the want of a due presentment for payment.—[BURTON, J. It is matter for consideration, that in order to make an offer amount to a waiver, the party should have notice of what he was to waive, and also that the defendant's acts may only amount to evidence of a waiver, and then that question should be left to the jury.]—In the present case the fact of knowledge is not before the court: the fault, if any, was giving an insufficient notice, and therefore the defendant was cognizant of the *laches* of the plaintiff the moment he received the notice of dishonor; and the only thing for the court to consider is, whether a subsequent promise to pay was or was not made by the defendant.—[BURTON, J. He may not have known the notice was bad, and therefore this might have been a question for the jury.]—"Whether due notice has been given of the dishonor of a bill, all the circumstances necessary for giving of such notice being known, is a question of law;" *Per Curiam* in *Bateman v. Joseph* (b); and the defendant cannot plead his ignorance of the law against the promise which he made. In all the cases when a doubt arose as to whether the defendant knew of his discharge or not, it was a doubt as to the fact of knowledge. It was thus in *Leaf v. Gibbs*, and in *Donnelly v. Howie*: *Borradaile v. Lowe* does not apply, the question in that case being between express and implied promises; the terms of the promise in this case is in terms absolute and unconditional. In many of the cases cited, in which the offer was held not to dispense with proof of due notice of dishonor, they were proposals and not promises to pay. *Hill v. Elliott* is similar to the present, and must govern it.

*Monday, June 10th.*

BURTON, J.,\* this day delivered the judgment of the court.—After stating the facts, and reading the notice, his Lordship said—the first question is, whether this notice is a sufficient notice of the dishonor of the bill, it being the only notice proved to have been given? This part of the case has been very ably argued on both sides, and many authorities have been relied on; but the principal case, and one which has led to conflicting decisions, is that of *Solarte v. Palmer*. If we were obliged

(a) 15 East, 275.

(b) 12 East, 433; S. C. 2 Camp. 461.

\* The LORD CHIEF JUSTICE was prevented by indisposition from hearing the greater part of the argument.

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to decide upon this objection it would be necessary to examine minutely several cases, but I should rather be disposed to say that, in my judgment, the court would be bound by the decision in *Solarte v. Palmer*, until revoked by the same authority. It is important to consider all the circumstances with respect to the defendant's letter, in coming to a decision upon the second objection. The plaintiff's attorney was willing to act upon the offer made by the defendant, and therefore, in this respect, there was a compromise going on; but the defendant did not carry his offer into effect. The defendant also took part in the proceeding taken against the drawer, in order to get as much as he could from him. It was objected that this letter was not admissible in evidence, and also that the terms of it did not amount to a waiver. I have no doubt the letter was admissible, and taking it with all the other circumstances, I cannot think the defendant has a right to have a nonsuit entered, on the ground that the jury had nothing to do with the question of waiver. The case of *Cuming v. French* has been relied on, but the distinction between that case and the present is, that in that case the defendant's offer was rejected, and therefore the plaintiff ought not to be allowed to make use of it; while, in the present case, the plaintiff's attorney assented to it. It was also objected that the defendant was a prisoner at the time he made this offer, and the case of *Rouse v. Redwood* was relied on: if this was an admission of a demand or confession made by the defendant when ignorant of his rights, that case would apply; but the present case does not fall within that class of cases, and so far from this being the case of a person acting in ignorance of his rights, the strong presumption is that he was perfectly well acquainted with them. It has been urged, by Mr. O'Callaghan, that ignorance of law would not be sufficient, but I do not think it necessary to go so far. The case of *Stevens v. Lynch* (a) strongly supports the principle contended for, and is very applicable to the present case. If an offer is made after full knowledge of all the circumstances, that offer may amount to a waiver of the objection of want of notice of dishonor; and it is not necessary to carry the principle farther. I do not pay much respect to cases decided at *nisi prius*; I go upon general grounds and upon the law on this subject, and I am satisfied that this was not a case for a nonsuit. As to the case of waiver, the letter of the 30th of July, 1838, was evidence for the jury, and there is no objection as to the manner in which that evidence was left to them; and I am certainly prepared to say that the admission of the defendant's liability on foot of the bill, with the knowledge of the facts of the case, may amount to sufficient evidence to dispense with the necessity of proving notice of dishonor. Upon these grounds we are of opinion that this was not a case for a nonsuit, and that

The rule must be discharged, with costs.

(a) 12 East, 38; S. C. 2 Camp. 392.

*Wednesday, May 29th.*

**MANDAMUS—GRAND CANAL COMPANY—RIGHT TO  
INSPECT BOOKS, &c.—PARTNERS AND JOINT  
STOCK COMPANIES.**

**The QUEEN v. THE UNDERTAKERS OF THE GRAND CANAL.**

In this case a conditional order had been obtained for a mandamus, requiring the Grand Canal Company, and their secretary, to permit the prosecutor, H. Fulton, at all reasonable times, to inspect the books of the said Company, containing the minutes of the several half-yearly meetings of said Company, and the Directors thereof, subsequent to the year 1789, and up to the present day. The affidavit of the prosecutor stated, that by the 11, 12 *Geo. 3, c. 31, s. 15*,\* whereby said Company was incorporated, it was enacted, that all the accounts, transactions and proceedings of said Company, shall be fairly and regularly entered in books to be kept for that purpose, to which every person having any share in the joint stock of said Company may have access to inspect, at all reasonable times; and that, accordingly, such entries had been made from time to time: that he made application for liberty to see these books, which was refused: that having reason to be dissatisfied with the mode of conducting the affairs of said Company, and with the accounts from time to time rendered to them, and on other grounds, that he conceived it proper that he should have access to these books, as by said statute he was authorised to have. The affidavits of the secretary and book-keeper of the Company were relied on as cause against the mandamus: they set forth several letters which passed between the prosecutor and Board of Directors, in which, to requests for a general permission to inspect the books, they expressed their willingness to afford him every facility, consistent with their duties, on his specifying the precise nature of the information he required: that the prosecutor having made applications in this form, they were complied with: that subsequently he applied for liberty to inspect the minute-books of the half-yearly meetings, without stating what further information he required, and that the Directors refused to comply with that application, referring him to the letter stating the circumstances under which alone such ap-

Where a proprietor in the Grand Canal Company applies for a mandamus, to compel the Directors to allow him to inspect the books and proceedings of the Company, under the provision of the 11 & 12 *G. 3, c. 31, s. 15*, he must shew that in his application to the Directors he stated the object for which he required the information he desired to obtain; and that the application was a reasonable one; and that the refusal of the Directors was unreasonable.

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\* "And be it further enacted by  
"the authority aforesaid, that all  
"the accounts, transactions, and  
"proceedings of said Company  
"shall be fairly and regularly en-  
"tered in books kept for that pur-  
"pose, to which every person  
"having in his own name and right  
"any share in such joint stock, or  
"his or her representative or repre-  
"sentatives, may have access at all  
"reasonable times to inspect."

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plications could be complied with: that the compliance with a request to extend his inquiry promiscuously over a period of fifty years, would be attended with great inconvenience. Against the conditional order

The *Attorney General*, with whom was Mr. *F. Blackburne*, Q. C., now shewed cause.—The Grand Canal Company are a trading corporation, and cannot be interfered with by a mandamus: *Rex v. The Governor, &c. of the Bank of England* (a): *Rex v. The London Assurance Company* (b). These cases clearly establish that this court will not grant a mandamus in a case of this kind: it is a high prerogative writ, and confined to cases of a public nature. The prosecutor claims a right to inspect the proceedings at all times, without specifying the object or purpose for which he seeks this information. The offer of the Company was fair and reasonable, and answered every purpose which a shareholder could have. The authorities go to this, that even in cases where the court will grant a mandamus, it will not do so to compel parties to allow an inspection such as is required in this case, unless the applicant has an interest in the inquiry, and also states the specific object of that inquiry: *Rex v. Clear*; (c) *Rex v. The Master, &c. of The Merchant Tailors' Company* (d): *Rex v. The Proprietors of the Wilts and Berks Canal Navigation* (e). In the last case there was a general power given by the act to the proprietors to inspect the books, &c., at all reasonable times; and in that case, *Patteson, J.*, said, “every proprietor has a right to the inspection here claimed; but, as at present “advised, I think that before we are called upon to grant a mandamus, “we should be informed that when the party applied for the inspection “he stated what his object was in requiring it.” Upon this ground, therefore, the court will refuse this application in the present case, even if it should be of opinion that the first ground was insufficient.

*Sergeant Greene* and Mr. *Holmes*, contra. The present case is not analogous to those that have been cited: they are cases of trading corporations. In these cases there was no statutable provision: the present case rests upon the direct enactment of a statute, and there can be no doubt that every member has a right to the inspection of the books of this Company. There is not any difficulty in seeing also that this concerned the Directors, who refused a liberty to do this. The present application is founded upon this principle, that where an act directs a certain thing to be done, which is not done, the court of Queen's Bench will compel the doing of it. There is an assumption, on the part of the Directors, of a discretion being given to them, which is not warranted

(a) 2 B. & Al. 620.

(c) 4 B. & C. 899.

(') 5 B. & Al. 899.

(d) 2 B. & Ad. 115.

(e) 3 Ad. & E. 477.

by the terms of the act.—[BUSHE, C. J. Would your client be entitled to remain alone with the books? because, otherwise, an officer must attend on him as long as he pleases.]—[BURTON, J.—If you rely upon that, you must establish your right under the statute.]—In the last case cited the court refused the application, upon this ground, that the persons applied to did not refuse the inspection required, but desired some time to consider the application, and told him to apply again, and before doing this he came into court, and moved for the mandamus. In the present case there is a positive affidavit of a refusal. In the cases relied on there was no statutable enactment, but where a statute directs a certain thing to be done, the party need not shew the grounds for his requiring that to be done. If the court refuse this application, it will decide that a shareholder, seeking information, must state his object in such a manner as to please the Directors. What was the object of the legislature in framing this enactment? clearly to guard against abuses. The only limitation in the statute as to the right of the proprietor to inspect the books and proceedings of the Company is, that it shall be done at all reasonable times. The enactment is as wide as possible, and manifestly includes a case where a proprietor may not know whether abuses exist or not, without an examination of the proceedings of the Company; and if it should be held that it is necessary to specify the precise object of the inquiry, the enactment will be rendered nugatory. If the proprietor asserts there are abuses in the accounts, is he bound to specify the particular books and entries in which these exist? He could not do it, and the whole object of the legislature would be thus defeated. It is no answer to say that the officer of the Company could not attend: if there be no limitation in the act, upon what ground can the court limit the right of the proprietor? We specify in our rule what books and proceedings we require to see, and although some of the requisitions to the Directors did not go so far as they desired, still we are entitled to the mandamus to the extent set forth in our rule.

Mr. *Blackburne*, Q. C., replied.—The applicant has an unquestionable right to inspect the proceedings of this Company, but it is altogether different whether he is entitled to come for a mandamus. He was apprised that the Directors were ready to allow the inspection of their books and proceedings, in such a manner as would prevent inconvenience to the Company. He now comes to this court without any object of justice. The rule is different from the affidavit on which it is founded. It does not make the least difference whether this be a corporation under an act of parliament or by charter: it is clearly a case in which the court would interfere, if proper grounds were laid for that in reference; and these grounds are stated by all the Judges, in *Rex v. The Merchant Tailors' Company*, to be, that it should appear that the applicant had

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made an application to the Company, in which he set forth the particular information required, and the specific purpose for which he required it.

BUSHE, C. J.—The prosecutor in this case does not state any grievance in his affidavit: he states he is deeply interested in the funds of the Company, but no object has been specified for the information or inquiries he sought.—[Mr. *Holmes* here read a passage from the prosecutor's affidavit, stating his dissatisfaction at the way in which the affairs of the Company were managed.]—Yes, but he does not state any grounds for that dissatisfaction. The rule must therefore be discharged.

BURTON, J.—In the way this application has been brought before the court, it must be refused. Every person has a right to inspect the proceedings of the Company, by act of parliament; but the question is as to the mode in which that right is to be enforced. The court must see that the application is made on reasonable grounds, and upon grounds which it would be unreasonable not to enforce. The proprietor might use his privilege so far as to impede the business of the Company in the exercise of this right. There are two considerations for the court; first, whether the application has been made to the Directors in such a manner as that they ought to have complied with it; and, secondly, whether the Directors have acted unreasonably in refusing the application. The prosecutor's case has not satisfied me upon either of these considerations: he has not shewn that the application was a reasonable one, or that he had a reasonable object in seeking the information he required; and, accordingly, we cannot say that the Company has acted unreasonably in refusing his application. No definite object has been assigned for the inquiry, and there is nothing before the court to shew that injustice has been done.

PERRIN, J.—The meaning of the act is not that the books and proceedings of the Company are to be always open for inspection. Each proprietor is entitled, for any useful purpose, to see the books and proceedings of the Company; but he has not the right to go into the Company's office, at all times, and require this inspection, which we would decide if we granted the present application. The case of *Rex v. The Proprietors of the Wilts and Berks Canal Navigation*, appears to me to govern the present case. In that case, all the Judges lay it down as a principle, that the object for which the information is required must be stated in the application; and if we granted the present application it would be departing from that principle, and create an inconvenience which might prove most detrimental to the interest of such a Company.

Rule discharged, with costs.

*Wednesday, May 29th.*

**STATUTE—IMPLIED REPEAL—GRAND JURY  
ASSESSMENTS.**

**JONES v. HAYES.**

This was a motion to confirm an award. An action of trespass had been brought against the defendant, the collector of Grand Jury rates for the county of the city of Cork, to try the question whether the 53 *Geo. 3*, c. 3, and 55 *Geo. 3*, c. 82 (local acts for the county of the city of Cork), are or are not repealed by the 6 *Will. 4*, c. 116. The award was in the affirmative. The 53 *Geo. 3*, c. 3, after providing for the valuation of the several houses and tenements within the said city, provides, in the 8th section, "that the said valuers shall not include in their valuation any house, &c., exempted from being charged by the 13 and 14 *Geo. 3*, nor any cabin or house which is or shall be under the yearly value of £5." The 55 *Geo. 3*, c. 82, directed, in addition to the above, that all houses in the possession of poor persons should be exempted from valuation. The 6 and 7 *Will. 4*, c. 116, s. 1, directs, that from and after the commencement thereof (1st November, 1836), it shall not be lawful for any Grand Jury of any county, county of a city or county of a town, except the county and city of Dublin, at any assizes, to make any presentment (save and except in the cases thereafter specially reserved and excepted) for the execution of any public work, or for raising any money, unless under the authority and by virtue of the provisions of that act. This act contains no such exemptions as those contained in the two recited acts, and the question was, whether the general provisions contained therein included the premises which were exempted in the former acts.\* A conditional order had been obtained

Where by local acts (53 *G. 3*, c. 3, and 55 *G. 3*, c. 82) for the county of the city of Cork, certain premises were exempted from Grand Jury assessments, and the general Grand Jury act directed in general terms, that the levy of a Grand Jury assessments should be under it, without exempting any particular property or persons, and did not notice these local acts; *Held*—that the latter act repealed them.

\* The 147th section empowers the collector to raise the money presented; and the 149th section enacts that the treasurer shall issue his warrant to the collector; "and in every such warrant shall be inserted the names of the several manors, &c., contained in that portion of the county which such person is to collect from, as the same is contained in the county books, barony books and applotment tables; and also the whole

"sum to be collected by such person, and the portion thereof of which each manor, &c., is to pay, according to its contents in the said books and tables, or as it has been usually rated at."

There are other enactments in the 6 & 7 *W. 4*, c. 116, affecting this question, but they are so numerous, and extend to so inconvenient a length, that they could not be compressed within the limits of a note.



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on a former day for confirming the award in this case, against which,

Mr. *R. Moore*, Q. C., with whom was Mr. *Smith*, Q. C., now shewed cause.—The late Grand Jury act enacts, that no money shall be raised except under that act; but the local act is not mentioned or repealed expressly by that act. Two affirmative statutes may stand together, and the court will not hold that one repeals the other unless it is done so in express terms; or unless the latter is inconsistent with the former. The first important section is the 147th, but that relates merely to the appointment of collectors: upon the 149th a question may arise, but there is nothing in this section inconsistent with the enactments of the local act. It provides that the warrants to the collectors shall be transcripts of the present county books, barony books and applotment tables, used under the local act, and therefore in these the exempted premises would not appear. The next section confirms this view, for it enacts that nothing herein contained shall be construed to repeal the 7 *Geo. 4*, c. 62; the manifest intention of the legislature being that all the valuations should remain in *statu quo*, until the provisions of that act should come into operation. The 151st section proceeds in the same way, and only refers to the manor, &c, and the persons in the treasurer's warrant. There is no inconsistency in the provisions of these statutes, nor is there any expression of an intention to disturb the mode of assessment which exists in any locality; and it is more reasonable to leave the valuation as it is, at present, which is quite analogous to the manner in which the entire valuation of the country will be regulated when the provisions of the 7 *Geo. 4*, c. 62, come into operation.

Sergeant *Greene*, and Mr. *Collins*, Q. C., *contra*.—The local acts are impliedly repealed by the late Grand Jury act. Affirmative statutes, if inconsistent, cannot both stand, but the subsequent statute will repeal the former: *Harcourt v. Fox* (a). An affirmative statute impliedly repeals a former act concerning the same matter, if it be introductive of a new law: *Exp. Caruthers* (b). The sections in the 6 and 7 *W 4*, c. 116, cannot be reconciled with those in the local acts, exempting, first, houses tenanted by the poor; and, secondly, houses of the annual value of £5. The 147th section of the recent statute contains a new and general provision as to the collection of Grand Jury rates, and the collector cannot be justified in any proceedings he takes except under that act. It weakens instead of strengthening the argument on the other side, that the recent statute does not refer to the local acts; but the enactments in the former being general, it lies upon those claiming exemption to take their case out of that statute. The several sections

(a) 1 Show. 426.

(b) 9 East. 44.

in the recent act materially differ from those of the local acts. The 150th section provides, that when the 7 *Geo.* 4 shall come into operation, that then all assessments are to be in conformity with its provisions, manifestly implying that until then they are to be regulated by the 6 and 7 *Will.* 4. The 29th section of the 7 *Geo.* 4 extends its provisions to counties of cities; and if this act were now in operation it would repeal the old act, being introductive of a new law. The general words, counties, is to be applied to counties of cities. This is the converse of the case of *Exp. Caruithers*. The 6 and 7 *Will.* 4, c. 116, provides, generally, for the applotment of all the property of the country, without any exemption, and therefore this enactment amounts to a repeal of any previous act exempting any particular species of that property from this burden. In the 150th and 151st sections the repeal of the 7 *Geo.* 4, c. 62, is expressly saved, thus shewing that in the minds of the framers of the latter statute its enactments would have repealed those of that statute.—[BURTON, J. The words of the Grand Jury act direct the valuation of all the premises.]—A point like this was raised after the passing of the Grand Jury act, with respect to the county of the city of Dublin, and although there are clauses excepting the county of the city of Dublin from the operation of this act, which makes its application to that locality more difficult, still it was held to apply. The obvious intention of the legislature was, that until the general valuation act came into operation, the valuation of all the property of the country was to be regulated by the 151st section of the 6 and 7 *Will.* 4.

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Mr. Smith, Q. C., replied.—If the two statutes can stand together, the subsequent statute will not repeal the former: *The Mayor of Leicester v. Burgess* (a). That was a case under the general beer act, and the court held that its provisions did not repeal local acts, regulating the sale of beer in certain localities; and in that case Patteson, J., says, that the general act “has nothing to do with the customs of particular places. If it had been intended to take away these customs they “would have been expressly noticed.” The same principle is established in the case of *Rex v. The Poor-law Commissioners* (b). The 150th section of the Grand Jury act does not admit the construction put upon it, but shews that the local act is not to be altered until the 7 *Geo.* 4 comes into operation. In *Williams v. Pritchard* (c) a general act was also held not to repeal a local act, though conversant about the same subject-matter. These cases establish that, if there be a previous act of parliament affecting a locality, a general act, concerning the same mat-

(a) 5 B. &amp; Ad. 246.

(b) 6 Ad. &amp; E. 1.

(c) 4 T. R. 2.

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ter, will not have the effect of repealing it. The court will be reluctant to throw a charge upon persons hitherto exempted from it.—[BURTON, J. The late Grand Jury act is a general act, and extends every where, and the words are so general as to comprehend all the property of the country, and it is in this respect a new law, and therefore repeals any other that is inconsistent with its enactments.]—The local act is merely referable to assessments: it is not a general act, regulating the Grand Jury presentments; and it is only so far as the regulation of assessments are concerned that we contend the late act does not apply to this locality, as it is only incidentally introduced, and consolidates the laws relating to assessments generally; but leaves the local assessments as they were. All that we contend for is, that the law relating to the local assessments is not affected by the recent act.

*Wednesday, June 5th.*

BUSHE, C. J.—The only question in this case is, whether the late Grand Jury act has or has not repealed the 53 *Geo. 3*, c. 3, which is the local act relating to the Grand Jury assessments of the city of Cork. Mr. Lane has made his award, stating it to be his opinion that it did repeal the latter act, and in that opinion the court concur.

Rule absolute.

*Tuesday, June 4th.*

PRACTICE—ENTERING JUDGMENT ON AWARD—  
MOTION—NOTICE.

WILLIAMS v. BRUEN.

Although a motion to confirm an award on an order of reference to arbitration made in a cause is unnecessary, yet where the terms of the deed of submission are, that the decision of the arbitrators should be made the judgment of the court, a motion for an order to enter up judgment is necessary. In such a case, notice of motion need not be given.

Mr. CORBALLIS applied for an order to confirm the award made in this case, and to enter up judgment pursuant to the terms thereof. It was an action of covenant, and after plea pleaded the case was referred to arbitration, by deed of submission, which was duly made a rule of court: part of the terms of the deed was that the decision of the arbitrators should be made the judgment of the court. The arbitrators having awarded a sum of £1055, the present motion was for liberty to enter up judgment for that sum. According to the recent decision in *Denis v. Deane* (a) a motion to confirm an award on an order of reference to arbitration was made in a cause, but the motion is required in order to enter up judgment.—[BURTON, J. Have you given notice of this application?—It was unnecessary in this case, from the terms of the deed of submission.

*Per Curiam.*—Take a conditional order.

Motion granted.

(a) 6 Law Rec. N. S. 378.

*Tuesday, June 4th.*

**PRACTICE—JUDGMENT AS IN CASE OF NONSUIT—  
COMPROMISE BETWEEN PARTIES.**

**CLARKE v. CALLAGHAN.**

Mr. O'CALLAGHAN moved for judgment as in case of nonsuit, this cause having been at issue more than three terms.

Mr. Rolleston, *contra*.—If there be a settlement of the record after notice of trial, or if the defendant admits the plaintiff's right of action, it will be sufficient cause against a rule for judgment as in case of nonsuit: *Wynne v. Kelly* (a). In this case the record was withdrawn, upon the terms that the defendant should pay the rent for which the action was brought, without costs. In *Mullings v. ———* (b), the court ruled that whenever a plaintiff had a good cause for withdrawing the record, it is answer to such a motion.

BURTON, J.—If any understanding takes place between the parties, by which the record is withdrawn, it is an answer to a motion for judgment as in case of nonsuit. In the present case the plaintiff seems to have withdrawn the record at the instance of the defendant.

No rule.

(a) 1 Law Rec. N. S. 8.

(b) 5 Taun. 88.

*Thursday, June 6th.*

**PRACTICE—JUDGMENT AS IN CASE OF NONSUIT—  
NOTICE OF MOTION.**

ANONYMOUS.

Mr. NELSON moved for a conditional order for judgment, as in case of nonsuit, upon the usual affidavit, shewing that this cause had been at issue more than three terms.—[The officer asked if a notice of this motion had been served upon the plaintiff's attorney?—Mr. Nelson stated that no notice of the motion had been given, but although it had been the practice to inquire whether a notice of a motion like the present had been served, he did not believe that by the established practice of this court such a notice was at all necessary. In the case of *Chambers*

On a motion for a judgment as in case of nonsuit, after notice of trial has been served and withdrawn, if it appear that the record was withdrawn at the instance of the defendant, or by any understanding to that effect between the parties, that will be a sufficient answer to such motion.

It is not necessary to serve notice of a motion for judgment, as in case of nonsuit, in this court.

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*v. Duigal* (a), in this court, it was held that it was unnecessary to serve a notice of this motion; and in the court of Queen's Bench, in England, which this court follows, it is the invariable practice to grant this motion without notice.

*Per Curiam*.—Upon the authority of the case which has been cited, we must grant the motion.

Motion granted.

(a) Batty, 46.

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PRACTICE—JUDGMENT AS IN CASE OF NONSUIT—  
PEREMPTORY UNDERTAKING TO GO TO TRIAL.

GILLMAN *v.* CONNOR.

Where a conditional order has been obtained for judgment as in case of nonsuit, on motion to make that order absolute, a peremptory undertaking is not of itself sufficient cause against the motion; but the plaintiff must shew some "just cause" for his delay.

Where the record is brought down for trial, and notice of trial withdrawn by the plaintiff, that will not be sufficient cause against this motion; *aliter*, if the cause be made a *remanet*, or the plaintiff be obliged by some circumstances of surprise, &c. to withdraw it.

Mr. R. LONGFIELD applied in this case for liberty to enter up judgment as in case of nonsuit, the cause having been at issue more than three terms. The affidavit stated that issue was joined in this cause, in or as of Hilary term, 1837: that notice of trial was served, a special jury struck, and the record brought down at the Spring Assizes: that same was subsequently withdrawn. A rule to stay proceedings, until payment of the costs of such notice of trial, was, on or about the 15th of April, 1837, entered, which was quashed on the 31st of May, 1838, upon the terms of plaintiff paying these costs, and proceeding to a trial of the issue in this case: that more than three terms had elapsed since the pronouncing of this order, and that no notice of trial had been served, although two Assizes had been since held. Under these circumstances the defendant is entitled to judgment.

Mr. J. J. Murphy.—Notice of this motion was served upon the plaintiff's attorney, upon the 27th of May last, and upon the 30th of same month a peremptory undertaking to go to trial was served upon the defendant's attorney. The rule *nisi* has been since obtained, without any intimation whatever to the plaintiff or his attorney.—[BURTON, J. The undertaking to go to trial appears a full one; but the statute seems to require that some good cause should be shewn for not having proceeded to trial in due course.]—[PERRIN, J., having read the rule of the court, which requires that a month's notice of trial should be served after three terms had elapsed, said the plaintiff was not now in a condition to go to trial at the next Assizes.]—It has been the invariable prac-

tice of all the courts to consider a peremptory undertaking to go to trial on the first opportunity, as a sufficient answer to a motion for judgment as in case of nonsuit.—[BURTON, J. The question in this case arises upon the construction of a statute, and if the practice has hitherto been wrong, that is no reason why the court should adhere to it. If the cases require that a good cause should be shewn for the delay, and that the court should judge of the sufficiency of that cause, this case cannot be decided as a motion of practice; but must be decided according to the construction which the court will put upon the statute. If cause be shewn against a motion of this nature, then the court is to judge of the sufficiency of that cause; but if no cause be shewn for the delay, then the court has nothing to justify the *laches* of the plaintiff. If this objection has come upon you by surprise, and as you may have some excuse to urge as cause against the order, we will give you time to bring that matter under the notice of the court.

Leave was given accordingly.

*Monday, June 10th.*

This motion was renewed, and a further affidavit was filed on behalf of the plaintiff, stating some circumstances, amongst others, that after consultation it was thought advisable to have certain witnesses, who were not in attendance, which induced the plaintiff to withdraw the record; and also that this was an action for false imprisonment, and that it was considered to be absolutely necessary, on the defendant's part, that the charge under which he was arrested should be disposed of before the action was tried. This was alleged as an excuse at one Assizes, and, at the following, that a prosecution for perjury against the witnesses against the plaintiff was pending. It also appeared that at the time the record was brought down, an application was made to the Judge to postpone the trial, upon the latter ground, and that he declined to do so.

Mr. *Longfield*, in moving for judgment, relied upon the grounds already stated, and urged that this was an action against a magistrate, who is privileged under 10 *C.*, sess. 2, c. 16, and 43 *Geo.* 3, c. 143, and that the court would not, in such a case, be disposed to extend any favor to the plaintiff.

Mr. *Bennett*, Q. C.—There are three good grounds against this motion; first, that a peremptory undertaking to go to trial, on the first opportunity, has been given by the plaintiff; secondly, that this cause was brought down to trial, after which this motion cannot be sustained; and, thirdly, the facts stated on the affidavit furnish sufficient excuse for

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the plaintiff's not going to trial on the former occasion.—[PERRIN, J. The second objection to this motion only applies where the case is made a *remanet*.]—There is no such distinction in the act: the defendant's proper course was to bring the case down by proviso. The words of the act do not apply to such a case as the present.—[CRAMPTON, J. The words are, bringing the cause to trial.]—[PERRIN, J. In 2 *Chitty's Archb.'s Pr.* 808, the rule is stated to be, that in addition to the peremptory undertaking, the plaintiff should shew to the court "just cause" for his not having proceeded to trial.]—It has hitherto been the established practice of the courts to refuse this motion, when it appeared that the plaintiff had once brought the case down to trial.—[BURTON, J. I recollect there were cases in support of that position; but the question is, how are the cases now? There is no rule, of authority, for such a practice; and how are the authorities upon this subject at present? The practice has been as you state, but I doubt whether that is the true construction of the statute.]—When the record is once made up and brought down, a motion of this sort cannot be entertained, but there must be a trial of the issue; and for this reason, that after the record is made up, the defendant may have the issue tried.—[PERRIN, J. The current of authorities go to this, that if the plaintiff himself withdraws the record, he exposes himself to a motion for judgment as in case of nonsuit; but if a party is obliged, by an unforeseen fatality, to withdraw the record, that will be considered sufficient cause against the motion.]—In the court of Exchequer the rule is as I state.—[CRAMPTON, J. The words "proceeds to trial" are very important.]—The court of Exchequer consider, that bringing down the cause satisfied these words.—PERRIN, J. You are not even now in a condition to go to trial, for you have not given, as you are bound to do, a term's notice of trial; and, in this respect, the plaintiff has been guilty of additional *laches*.]—It was expressly decided, in *Crawford v. Huddleston* (a), that where the plaintiff once brings down the case to trial, the defendant cannot have judgment as in case of nonsuit.

Mr. *Longfield* replied, and relied on the case of *Burton v. Harrison* (b), which was precisely similar to the present. The plaintiff brought the record down, and afterwards withdrew it, *Grose, J.*, saying, that the doing that did not at all satisfy the words of the statute; and as to the necessity of some excuse on the part of the plaintiff being required, in addition to a peremptory undertaking to go to trial, *Nichol v. Collingwood* (c), and *Walter v. Buckley* (d), are express authorities.

BURTON, J.—Under all the circumstances of this case we will allow

(a) *Glasc.* 125: but see this case reversed in same book, 141.

(f) 1 *East*, 346.

(c) 1 *Dowl. P. C.* 60.

(d) 2 *Chit.* 244.

the cause shewn; although we entertain considerable doubts as to its sufficiency. It has been alleged that if the plaintiff give a peremptory undertaking to go to trial, that that in itself is an answer to this motion. There is ground for alleging that it has been so considered by the court of Exchequer, and upon my own recollection I would be disposed to say that this court acted upon the same construction of the statute. I do not recollect a case decided upon argument, but upon the true construction of the statute I do not think that a mere peremptory undertaking ought to prevail against this motion; but that it is necessary that some cause existed for the delay. Some cause ought to be shewn, but a slight cause will be sufficient, and that is what I believe has been the general practice of this court. As to the second ground of objection, namely, that this cause having been brought down for trial, and the notice of trial subsequently withdrawn by the plaintiff, I do not think that that mere circumstance ought to prevail as an objection to this motion. As to the third ground, the plaintiff has accounted for his delay in such a way as that the court will not act upon its strict rules. A ground has been suggested, which has had great weight with the court, namely, that a criminal prosecution having been pending against him, and an indictment found, which were circumstances under which it was not to be expected that he would go to trial; but this excuse was only as to one Assizes. The plaintiff was acquitted, and then instituted a prosecution for perjury against the witnesses against him, the pendency of which prosecution is alleged as an excuse for not going to trial at the following Assizes. I am not prepared to admit the validity of this excuse, because I do not see why he might not have tried his action notwithstanding this prosecution. However, under all the circumstances of this case, and considering the nature of this action, and that the party never can try the merits except in the present action, we are all of opinion that the cause ought to be allowed.

CRAMPTON, J.—The practice of this court ought to be conformable to that of the Queen's Bench in England, where a just cause for the delay ought to be shewn. Under the circumstances, however, he concurred in the judgment of the court.

PERRIN, J., concurred with his brethren, although he entertained great doubts upon the subject, and was by no means satisfied that, in strictness, the defendant should not carry his motion. Besides the peremptory undertaking to go to trial, the plaintiff is bound to shew some just cause for his previous *laches*; and so far from the serving notice of trial constituting an excuse, it is an aggravation of the plaintiff's negligence by harrassing the defendant. But as the court of Exchequer has heretofore held a different opinion on this subject, and as the plain-

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tiff would be without remedy, and from the peculiar circumstances of the case, I concur in the decision of the court, upon the terms on which we have agreed.

Order.—Let the cause shewn against the said conditional order be allowed, upon the terms of the plaintiff hereby peremptorily undertaking to go to trial at the next assizes, or, in default thereof, let the said defendant be at liberty to enter up judgment in this cause as in case of a nonsuit, without further motion; and let plaintiff pay to defendant the costs of this motion.

Thursday, June 6th.

### MANDAMUS—APPOINTMENT OF APPLOTTERS UNDER THE LATE GRAND JURY ACT.

The QUEEN v. CLENDINNING, and the Inhabitants of the Parish of Kilmaclasser.

Where it appeared that a meeting was called for the purpose of appointing new applotters under the late Grand Jury act (6, 7 Will. 4. c. 116) and it was sworn that the proceedings could not be carried on in consequence of the tumult occasioned by persons who deponent believed acted in this manner to prevent such appointment, and the time had nearly expired within which the applotment should be made under the terms of the act, an absolute order for a *mandamus* was granted.

Mr. O'Dowd applied for an absolute order for a *mandamus*, directing G. Clendinning, and the inhabitants of the parish of Kilmaclasser, in the county of Mayo, to meet and appoint applotters, to applot the Grand Jury cess, under the 6 and 7 Will. 4, c. 116, s. 151. He moved upon the affidavit of John Duffy, a landholder of the parish, which stated that deponent, on behalf of himself, and for the interest of the parishioners, had served John Burke, the high constable of the barony, with a notice, calling on him to levy and collect the Grand Jury cess for the parish, and that ulterior proceedings would be taken against him if he omitted to do so. This notice was served by three landholders, the act of parliament requiring only two, and bore date the 21st of March, 1839, and was served on him several days before he received the treasurer's warrant. On the 30th of March, in compliance with that notice, said Burke served Clendinning, the seneschal of the manor of Doyne and Ballinloch, with a notice, calling on him to summon a meeting of cess payers, to elect applotters, who called a meeting, pursuant to the notice. At this meeting deponent stated that the greatest uproar and confusion prevailed, to such a degree that it was impossible to put the question as to two persons who were proposed as applotters, and that deponent believes this was done to prevent the election of any such. That it was of the greatest importance to have new applotters appointed, as many of the inhabitants of the parish were greatly oppressed by the old assessments, which were very unequal. The deponent further stated that there were no churchwardens in the parish. It was doubted, for some

time, whether a *mandamus* could go to the inhabitants of a parish, but the case of *Rex v. The Inhabitants of Wicks* (a), decided by Lord Tenterden, and also *Rex v. The Inhabitants of St. James*, given in a note to the former case, have both settled this doubt: a similar decision has been pronounced by Lord Denman, in *Rex v. The Inhabitants of St. Saviours* (b). —[PERRIN, J. Do any of these cases decide that you are entitled to a peremptory *mandamus*?]—We do not apply for a peremptory *mandamus*, but only for an absolute order for the ordinary *mandamus*, and such order was rendered necessary for this reason: the meeting, which is noticed in the affidavit, was held on the 3d of May, and the act declared unless a new applotment was made within thirty-six days after such meeting, the high constable was directed to proceed to collect the cess upon the old applotment. The thirty-six days had almost expired, and the grievances of the parishioners would be continued if the old applotment were acted upon. There is a case in *Sayer*, in which Ryder, C. J., granted an absolute order under similar circumstances.—[BURTON, J. They may make a return to the *mandamus*, and you cannot expect to have that return until next term.—PERRIN, J. They might also submit.]—We will take our chance. It would be of great importance if the court would make it part of the order that the high constable could not collect the cess under the old applotment.

PERRIN, J.—We cannot do that: we can only give the absolute order for the *mandamus*.

Rule absolute.

(a) 2 B. & Al. 199.

(b) Nev. & P.

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## COMMON PLEAS.

Thursday, May 30th.

PLEADING—NUL TIEL RECORD—SCIRE FACIAS—  
JUDGMENT—VARIANCE—SCIRE FACIAS TO REVIVE  
A JUDGMENT—PLEA, "NUL TIEL RECORD."

Administrator KELLY v. DOLPHIN.

Where the judgment commenced thus—  
"County of the city of Dublin, to wit: H. D. of S. in the county of Galway, was attached to answer B. K. of Loughrea, in said county;" and the writ of *sci. fa.* commenced thus—  
"To the Sheriffs of the county of the city of Dublin greeting, &c. Whereas B. K. of Loughrea, in said county:" Held, upon plea of *nul tiel record*, that there was a fatal variance in the description of the conuzee of the judgment; the words "said county" in the judgment referring to the county of Galway, and the same words in the *sci. fa.* referring to the county of Dublin.

Mr. J. D. FITZGERALD, in support of the plea.—The judgment in this case commences thus:—"County of the city of Dublin, to wit. "H. D., of S., in the county of Galway, was attached to answer B. K., "of Loughrea, in said county." The writ of *scire facias* commences thus:—"To the sheriffs of the county of the city of Dublin: greeting, &c. &c. Whereas B. K., of Loughrea, in said county." The words, "said county," in the judgment, by plain grammatical construction, refer to the last antecedent in the sentence, viz., "county of Galway," while the words, "said county," in the *scire facias*, as plainly and obviously relate to the words, "county of the city of Dublin," and thus, in each case, forms part of the description of the conuzee of the original judgment. The variance then, relied upon by the defendant, is this—the *scire facias* purports to have been issued to revive a judgment obtained by B. K., of Loughrea, in the county of Dublin, and the judgment now produced appears to have been recovered by B. K., of Loughrea, in the county, of Galway. This is a fatal variance, and in a material point—in the description of the conuzee of the judgment: *non constat*, that B. K., mentioned in the *scire facias*, is the same person as the conuzee of the judgment. That such a variance is fatal is decided in the case of *O'Brien v. Whillaw* (a), where in the record, the defendant was entitled "gentleman:" in the *scire facias* he was described "esquire;" and that was held, by the court of Queen's Bench, to be a fatal variance; and in a case decided in the court yesterday (b), the authority of that case was recognised and followed. The variance in the case decided here was in the description of the conuzee in the *scire facias*: he was described as "esquire:" in the record as "gentleman." In a late case, *Hozier v. Powell* (c) the court of Exchequer held that a variance consisting in the omission of a single letter was fatal; and in *Walters v. Mace* (d) the variance consisted of a misdescription of the

(a) 2 Law Rec. N. S. 148.

(c) 6 Law Rec. N. S. 288.

(b) Donohoe v. Gibbons.

(d) 2 B. &amp; Al. 756.

magistrate before whom the informations were taken : he was described as "Baron Waterpark, of Waterfork," instead of "Waterpark." The following cases were also cited and relied upon: *Pet v. Green* (a); *Wilson v. Gilbert* (b); *Chetly v. Wood* (c).

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Messrs. *Macdonagh* and *Fitzgibbon*, *contra*.—In *O'Brien v. Warlters* the variance was in the degree, which is part of the name, and not in the residence, as in the present case. In *Warlters v. Mace* the variance was also in the name or title, for Waterpark, of Waterfork, is part of the title, and not of the place of residence. In the judgment there are two counties mentioned, and the word "said" may, and ought to be held to refer to the county of Dublin, being the venue laid in the margin of the declaration; for, in pleading, every place mentioned is considered to refer to the venue on the margin.—[TORRENS, J. According to the plain rules of grammatical construction the word should refer to the county of Galway.]—Then suppose "said" to mean last-mentioned, there may be a Loughrea in Dublin as well as in Galway, and the court will make all reasonable intendments against such a defence as the present, and there is nothing to prevent the court from intending that the conuzee may have changed his place of abode from Loughrea, in the county of Galway, to a place of the same name in the county of Dublin. Then, again, it was not necessary here to state the residence at all, and it may be rejected as surplusage: thus, in *Draper v. Garrett* (d), where there was a variance in setting out the names of the suitors before whom a plaint had been levied, it was held, that inasmuch as it was not necessary to state the names of the suitors, a variance, in that respect, was not fatal, for the allegation might be rejected as surplusage; and also, it is a well-established rule of pleading, that where words are used which might have been omitted, such words are mere surplusage, and may be rejected.—[TORRENS, J. That rule does not apply to setting out records.]—The court is bound, if possible, to support the writ of *scire facias*, for the preparation of it is the act of the officer of the court, and the plaintiff has nothing to do with it..

Mr. *Monahan* replied.—The variance relied upon here is, in principle, precisely the same as that which was held to be fatal in *O'Brien v. Whittaw*, and in the case decided here yesterday; and unless the court are prepared to overrule those two cases, they must allow the present plea. The rule relied on, upon the other side, that every place stated in the pleadings is referable to the venue in the margin, applies only to the case of a material traversable allegation; and, upon the plain rules of

(a) 9 East. 188.

(c) 2 Salk. 659.

(b) 2 B. &amp; P. 281.

(d) 2 B. &amp; C. 2.

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construction, the words "said county," in the judgment, refer to the county of Galway. In *Draper v. Garrett* it was not necessary to state the record, and the variance was therefore in the statement of a fact or allegation of substance, and not of a record; and so also in *Purcell v. M'Namara* (a), Lord Ellenborough and the other Judges held, that in an action for a malicious prosecution, it was not necessary for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appeared to be before action brought, and therefore that a variance between the day stated in the record, and the day laid, was not material; the day not being laid in the declaration as part of the description of the record. Lord Ellenborough, in his judgment in that case, clearly points out the distinction between allegations of matter of substance, which may be substantially proved, and allegations of description which must be literally proved. *Draper v. Garrett*, and *Purcell v. M'Namara*, are, in fact, authorities in support of the plea. Then, as to the argument upon the other side, that the residence of the party need not have been stated at all, we answer, that having been stated in the judgment it must be set out accurately in the *scire facias*. It has also been argued by the counsel for the plaintiff, that a variance in the residence of the party is not material; but it is laid down, in a book of high authority. 1 *Stark. on Ev.* 430, that, "in debt upon a judgment, a variance in the name of a party, *his abode*, or addition, will be fatal upon *"nul tiel record* pleaded." There is no hardship upon the plaintiff in the present case, for his attention was called to the variance by the plea, and he might have amended.

*Per Curiam*.\*—It appears from the passage cited from *Starkie*, that a variance in the "abode" of a party is as fatal as a misstatement in his "addition;" and we think that *O'Brien v. Whillaw*, and the case decided in the court, rule this present case.

Plea allowed.

(a) 9 East, 157.

\* TORRENS and BALL, Js.—The CHIEF BARON and JOHNSON, J., sat in the Court of Error.

## EXCHEQUER OF PLEAS.

*Tuesday, April 23d.*

## BAIL IN ERROR CORAM VOBIS—PRACTICE.

WHITE v. MULHALL, Gent. Attorney.

Mr. FITZGIBBON on behalf of the plaintiff, moved that the defendant do give bail to the writ of error in this cause, in four days, or that the plaintiff be at liberty to issue execution.

A defendant having brought a writ of error *coram vobis*, ordered to give bail in error in four days, or plaintiff to be at liberty to issue execution.

This was an action on a bill of exchange. Judgment had been marked and execution issued, but on the day the execution passed the seal, a writ of error *coram vobis* was issued by the defendant. The plaintiff applied for the order now sought for, in the office, but no instance having occurred of late years, in which such an order had been issued, the officer declined to issue it in the present instance, without the direction of the court. In support of the motion counsel referred to the following statutes: 10 *Car.* 1, sess. 3, c. 8; 17 and 18 *Car.* 2, c. 12, s. 3; 7 *W.* 3, c. 25, s. 9; and observed that the statute of the 1 and 2 *G.* 4, c. 68, s. 8, being conversant about writs of error returnable into the Exchequer Chamber only, was not applicable to a case like the present.

Notice of the motion had been given, but there was no appearance for the defendant.

An order was made in the following terms:—

It is ordered by the COURT\* that the defendant do give bail in error, in four days after service of this rule, or plaintiff to be at liberty to issue execution.

\* The CHIEF BARON and Baron RICHARDS.

*Wednesday, May 29th, 1839.*

## JUDGMENT AS IN CASE OF A NONSUIT—SEALING RECORD—PRACTICE.

GRAYDON v. REARDON.

Mr. BILLING, on behalf of the defendant, moved for liberty to enter up judgment as in case of nonsuit, the cause having been at issue since the 4th of February, 1837.

Where a case was entered in the list of records for trial at the sittings after term, but

in consequence of the death of the Lord Chief Baron, was not tried, the court refused to give judgment as in case of a nonsuit, the plaintiff not having withdrawn the record, or been in default.

When the plaintiff withdraws the record, after entering the case for trial, the defendant may have judgment as in case of a nonsuit, the mere entering of the record for trial not being of itself sufficient to prevent it.

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*Mr. Rolleston, contra.*—The plaintiff has made an affidavit, from which it appears that the record was made up, and entered in the list of causes for trial, before the late Lord Chief Baron, at the sittings after Trinity Term, 1838, but that in consequence of his Lordship's death, it was not tried. The plaintiff further states, that the record has not been withdrawn or countermanded, and that his reason for not pressing the case forward is, the alleged insolvency and inability of the defendant to pay the demand for which he is sued. This case does not come within the words of the 28 G. 3, c. 31, s. 2, for here the plaintiff has not neglected to bring down the case to be tried according to the course of the court; on the contrary, he has entered the record for trial; and, in *Williams v. Stewart*(a), which was cited and recognised in the subsequent case of *Malone v. Nicholson*(b), this court is reported to have held, that where a plaintiff has once entered a cause for trial, the defendant will not be permitted to enter up judgment as in case of a nonsuit, his remedy being, to bring the case to trial by proviso.—[PENNEFATHER, B. That is incorrect: for where the plaintiff withdraws the record, after entering it for trial, the defendant may have judgment as in case of a nonsuit(c). The mere entering of the record for trial is not of itself sufficient to prevent a judgment as in case of a nonsuit, if the plaintiff afterwards withdraw it; for in such a case (to use the words of the statute), he “neglects to bring the issue to trial according to the course and practice of “the court.”]—In the late case of *Wright & Perrin v. Hodgins*(d), this court refused an application for judgment as in case of a nonsuit, under circumstances precisely similar to those in the present case.

*Mr. Billing, in reply.*—It cannot be said that the record was entered for trial, as, in strictness, it is not a record until sealed, which was not the case here. *Lessee Crawford v. Huddleston*(e), is an authority that sustains this application.

PENNEFATHER, B.—It is quite a mistake to say that a case cannot be entered for trial until the record has been sealed; on the contrary, the record may be entered in the list, although it has not been sealed; and according to the practice of the court, it need not be sealed, until the case has been called on for trial. This course was adopted by the late Chief Baron, to save suitors expense, when, from the pressure of business in this court, many trials were unavoidably postponed. In *Lessee Crawford v. Huddleston*, which has been cited, the record was withdrawn; and that case, therefore, falls within the distinction of which I have spoken. This

(a) 4 Law Rec. 2d Ser. 171.

(b) 6 Law Rec. 2d Ser. 280.

(c) See acc. *Burton v. Harrison*, 1 East, 346.

(d) Ante, p. 268.

(e) Glasc. 141.

motion must, under all the circumstances, be refused—the case was carried down to be tried according to the course of the court; the record was made out, and ready to be sealed; and it was not in consequence of any default on the part of the plaintiff, that the trial did not take place. Therefore,

Refuse the motion, with costs.

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Monday, June 3d.

EXCISE—REVENUE—MALT—FORFEITURE—REPEAL OF  
 STATUTE.

The ATTORNEY GENERAL *v.* JOHN DUNN, claiming Malt.

INFORMATION *in rem*, seeking the forfeiture of 3184 bushels of malt. The third count, upon which alone the Crown relied in order to sustain its right to the forfeiture, stated, that the malt was found in a certain building, to wit, a malt-store which was used by certain maltsters, to wit, John Dunn and Martin Mangan, without the said Dunn and Mangan having made a true and particular entry in writing of the said building, by delivering such true and particular account as by the act relating to the trade and business of maltsters was and is required, to the officer of excise in whose survey the said building was intended to be used, whereby the malt became forfeited.

On the trial, which took place before BARON FOSTER, at the sittings after Easter Term, the case made on the part of the Crown, so far as it related to the above count, was, in substance, that the malt-store in which the malt in question had been found and seized, was entered in the name of Dunn, although he was but the clerk of Mangan, who was the true proprietor of the premises, and of the trade and business carried on therein. The case made by Dunn, the claimant, was, that Mangan had been originally the proprietor of the premises in question, as well as of another malt-store, and had carried on business in both until January, 1838, when he withdrew from the former concern, and handed over the possession of it to Dunn, the claimant, who thereupon made entry of the premises in the manner prescribed by the act of the 4 & 5 W. 4, c. 51, and having obtained a maltster's license, carried on trade therein on his own

The 7 & 8 G. 4, c. 52, s. 1, enacts, that if any maltster shall use any building for keeping malt, without having made a true and particular entry in writing thereof at the next office of excise, he shall forfeit and lose £100, and all the malt found in any such building shall be forfeited. The 4 & 5 W. 4, c. 51, s. 6, enacts, that any person carrying on any trade subject to the excise laws who shall make use of any building of which entry is required to be made by any act relating to the revenue of excise, without having made entry thereof in

the manner directed by the said last mentioned act, *i. e.*, by delivering an entry to the officer of excise in whose survey the building intended to be used is situated, shall, for any such unentered building, forfeit £200; but the latter act contains no provision for the forfeiture of any goods found in such building. *Held*, that so much of the former act as imposed the forfeiture of malt found in an unentered building, was impliedly repealed by the above enactments of the latter.

When there are two statutes having the same purview, and inflicting different punishments for the same offence, the punishments are not to be taken as cumulative, but the latter statute is to be taken as expressing the intention of the legislature, and, therefore, so far as relates to the punishment, repealing the former one.



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account, and was the real owner of the malt in question. Under these circumstances, it was insisted, by the counsel for the Crown, that they were entitled to a verdict on the third count, it having been, as they contended, proved, that Mangan, and not Dunn, was, at the time of the seizure, the true and real owner of the trade and business, and as the entry made by Dunn was therefore void by the 20th section of the 7th & 8th G. 4, c. 53, the building was consequently unentered, and the malt found therein forfeited.\* On the other hand, counsel for the claimant contended that the Crown was not entitled to a verdict on the third count:—first, because the statute of the 4 & 5 W. 4, c. 51, operated as a repeal of so much of the 7 & 8 G. 4, c. 52, s. 1, as related to a forfeiture of malt found in an unentered place; and secondly, because the offence imputed by the third count would not, even if proved, cause a forfeiture of the malt. The learned Judge, although he declared his opinion to be, that the latter act was repealed by the former, yet, in order to raise the question for the consideration of the court, told the jury, that if they believed, upon the evidence, that the claimant, John Dunn, was not the true and real owner of the trade or business carried on in the said building, they ought to find a verdict for the Crown upon the third count of the information. His lordship, however, saved the points so made by the claimant's counsel, and directed the jury to state, when returning their verdict, the ground upon which they found it. The jury accordingly stated, that they found for the Crown, upon the ground of the malt being the property of Mangan. A verdict having been entered for the Crown upon the third count,

Mr. *Maley* now moved, that the points saved should be ruled in favor of Dunn, the claimant, and either that a verdict might be entered up for him, or a new trial had. The first ground relied on by the claimant is, that so much of the 7 & 8 G. 4, c. 52, s. 1, as relates to the forfeiture of malt found in a building used by a maltster, without a true and particular entry in writing of such building having been made, was repealed by the 4 & 5 W. 4, c. 51, s. 6, and therefore, although the malt was found in a building which was used by a maltster, without a true and particular entry having been made pursuant to the latter act, no forfeiture of the malt took place. The second ground is, that the offence

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\* By the 20th section, it is enacted, "that no entry of any building made by any person under any act relating to the revenue of excise, shall be, or deemed or taken to be, a legal entry thereof, unless the same shall have been made by and in the name of a per-

son who shall, at the time of making such entry, have attained the age of 21 years, and who shall be the true and real owner of the trade or business therein or thereby carried on, or in respect of which such entry of such building shall have been made."

stated in the third count would not, even if proved, cause a forfeiture of the malt. The 7 & 8 G. 4, c. 52, s. 1, directs a maltster to make an entry of all buildings, &c. intended to be used by him, and to deliver such entry at the next office of excise; and inflicts, for non-compliance therewith, a penalty of £100, and a forfeiture of all malt found in the building. The 7 & 8 G. 4, c. 53, s. 18, enacts, that every person required to make entry of that or any building under any other act or acts of parliament, shall deliver such entry to the officer of excise in whose survey such building shall be intended to be used; but this act inflicts no penalty in case of non-compliance. In this state of the law, a question very similar to that which arises in the present case arose in the case of the *Attorney General v. Dyer (a)*. The second count of the information, in that case, was similar in every respect to the third count of the information in this, save that it sought only the pecuniary penalty of £100, for using an unentered cistern; and upon a verdict being had for that penalty, the judgment was arrested, because the offence charged by the information, that is, the not making an entry with the officer of excise in whose survey the building was situated, was not the offence to which the penalty was annexed. So here, the third count seeks a forfeiture for an offence to which a forfeiture does not attach. By the 4 & 5 W. 4, c. 51, s. 5, all excise traders are directed to make their entries with the officer of excise in whose survey they carry on trade, and the 6th section imposes a penalty of £200 for using a building not so entered, but inflicts no forfeiture of the goods found therein. The offence imputed by the third count of this information is not the offence created by the 7 & 8 G. 4, c. 52, and for which the double punishment is provided, but the offence created by the 4 & 5 W. 4, c. 51, upon which the penalty of £200 is imposed.

Mr. *Blacker*, Q.C., and Mr. *Bennett*, Q.C., with whom was Mr. *Tomb*, for the Crown.

The only question raised on the part of the defendant at the trial was, whether the 4 & 5 W. 4, c. 51, repealed the 7 & 8 G. 4, c. 52? We say it does not. A subsequent act may repeal a former act, either expressly or by implication. The first of these modes being out of the question in this case, it follows, that if one of these acts has been repealed by the other, it must have been by means of its implied operation; but a later act of parliament is not to be construed as repealing a prior one, unless there be some contrariety or repugnance in them; *Dwarris on Statutes*, 674. Now, although it may be conceded that the 4 & 5 W. 4, c. 51, s. 6, repeals the 7 & 8 G. 4, c. 52, s. 1. *quoad* the penalty, it does not necessarily follow that it repeals it, *quoad* the forfeiture. The for-

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(a) 2 Crompt. & Mees, 664.

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feiture and penalty are quite distinct things, and constitute different species of punishment. Again, where there is a difference in the whole purview of two statutes relating to the same subject, the former remains in force; *Dwarris, ubi supra*; *Rex v. Downes (a)*. Nothing can be more different than the purview of the acts in question, the one relating exclusively to malt, the other relating generally to the excise.—[The COURT.\* It cannot be said there is such a difference in the purview of these statutes; on the contrary, the whole purview of the statute relating to malt must be the same as that of the statute relating to the excise generally. According to the argument on the part of the Crown, it is to be inferred that it was the intention of the legislature to subject maltsters to an increased penalty in addition to the forfeiture of the malt, while all other persons, not maltsters, were to be subjected to the penalty only.]—At the time the *Attorney General v. Dyer* was decided, there were two statutes in force, prescribing different modes of making the entry, viz., the 7 & 8 G. 4, cc. 52 & 53; and the count, in that case, although purporting to be founded on c. 52, did not follow the terms of that act; but that case can have no application to one like this, where the count has been framed since the passing of a third statute, prescribing one uniform mode of making the entry in all cases. Were it not for the new act, it must be admitted that this would be a bad count. The question now to be decided is, whether a general act, inflicting a new pecuniary penalty, or rather increasing the old one, must impliedly repeal a prior special act, inflicting both a pecuniary penalty and a forfeiture. In *Dwarris*, 674, it is laid down, that a later statute, which is general, does not abrogate a former one, which is particular. So it has been held, that a subsequent act, only increasing the penalty, does not repeal a former act; *The King v. Ahearne (b)*.

Mr. *John Martley*, Q.C., in reply.—The legislature, by the 4 & 5 W. 4, c. 51, either intended to double the penalty and take off the forfeiture, or they altogether overlooked the punishment inflicted by the 7 & 8 G. 4, c. 52; but in either case, whether they acted designedly or inadvertently, the consequence, so far as it relates to the repeal of the latter statute, is the same. The objection to the third count of the information is, that the offence therein stated is not one to which the punishment of forfeiture is annexed; *non constat* but that an entry may have been made at the next office of excise, pursuant to the requisition of the statute creating the forfeiture. In the construction of clauses inflicting pains and penalties in the revenue laws, the rule is, that if they be ambiguously

(a) 3 T. R. 569.

(b) 2 Huds. &amp; Bro. 362.

\* FOSTER, Baron, and RICHARDS, Baron.

and obscurely worded, the interpretation is ever in favour of the subject; *per Heath, J., Hubbard v. Johnstone (a)*; *S. P. per Lord Wynford, Rex v. Winstanley (b)*. Therefore, either upon the ground, that the penal part of the 7 & 8 G. 4, c. 52, has been repealed by the 4 & 5 W. 4, c. 51; or, upon the principle established by the case of *The Attorney General v. Dyer*, that the crown is not at liberty to borrow the offence from one act, and the punishment from another, the points saved ought to be ruled with the claimant.

*Cur. advis. vult.*

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*Wednesday, June 12th.*

FOSTER, B. on this day pronounced the following judgment:—This case comes before us upon a point which was saved by me upon the trial of an information at the suit of the Crown, seeking the forfeiture of a very large quantity of malt, on the ground of its having been found in a place not duly entered according to the statute. The jury found the place to be an unentered one, and the question is, whether, upon the construction of the two statutes, 7 & 8 G. 4, c. 52, s. 1, and 4 & 5 W. 4, c. 51, s. 6, the circumstance of the malt having been found in that unentered place now induces the forfeiture of the malt? That a pecuniary penalty is inflicted under these acts on the offender, there is no dispute; and the recovery of that pecuniary penalty, in relation to this transaction, has already been the subject of another information at the suit of the Crown, in which the Crown succeeded. But the much more serious question still remains, whether the malt itself is forfeited,—and that must confessedly depend on the construction that is to be given to the two statutes above mentioned considered in common with each other. The 7 & 8 G. 4, c. 52, s. 1, provides, that if any maltster shall use any place for the keeping of malt, without having made a true and particular entry thereof, in writing, at the next office of excise, he shall forfeit the sum of £100; and it is added in the same sentence, that all the malt found in any such building shall be forfeited. Here are two penal consequences enacted, both in the same sentence, and both to follow from the same offence: first, the loss of £100; secondly, the forfeiture of the malt. If the question rested on the statute 7 & 8 G. 4, c. 52, s. 1, there could be no doubt in the case—the malt would be clearly forfeited under that act; but the legislature have legislated anew on the subject, and enacted, by the 4 & 5 W. 4, c. 51, s. 6, that any person carrying on any trade, who shall make use of any building of which entry is required to be made, without having made entry thereof, shall, for every such unentered place, forfeit £200. Here there is only one penal consequence made to follow the using an unentered place, and that consequence is dif-

(a) 3 Taunt. 220.

(b) 1 Crompt. & Jerv. 441.

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ferent from either of the two penal consequences made to follow under the act of the 7 & 8 G. 4, c. 52, s. 1. The two penal consequences made to follow by that last act being, as I have stated, first, £100 pecuniary penalty; secondly, the loss of the malt; but by the 4 & 5 W. 4, c. 51, s. 6, the only consequence being a pecuniary penalty of £200. Now, the question raised is simply this—Does the latter act impliedly repeal the former one? I consider it to be a general principle of law, that where there are two statutes, having the same purview, and inflicting different punishments for the same offence upon the offender, the punishment shall not be taken to be cumulative, but the latter statute shall be taken as expressing the intention of the legislature, and shall therefore, so far as relates to the punishment, repeal the former one. When the difference consists in the punishment provided by the latter act being greater than the punishment provided by the former one, it was decided by Lord Mansfield, that this consequence shall follow, in the case of the *King v. Cator*, which will be found in 4 Burr. 2026; and when the difference consisted in the punishment provided by the second act being a lesser or milder punishment than that provided by the former one, it was decided unanimously by the twelve Judges, in the case of the *King v. John Davis (a)*, that the latter statute is a virtual repeal of so much of the former one as relates to the offence. An application of this principle, well known to every Irish lawyer, may be found in the construction given to the remarkable enactments made by the Irish legislature, in relation to the offence of a Roman Catholic Clergyman celebrating marriage between two Protestants, or between a Protestant and Roman Catholic. This offence was, by the 12 G. 1, c. 3, s. 1, made a capital felony; but by the 33 G. 3, c. 21, s. 12, was made an offence subjecting the offender to the pecuniary penalty of £500. In conformity with the principle above stated, this latter act has always been considered to have impliedly repealed the former one. Now, the only way of distinguishing the present case from those to which I have referred, is by contending that the infliction of the penalty of £100, under the 7 & 8 G. 4, c. 52, s. 1, and the forfeiture of the malt, are two consequences essentially distinct from each other, the one being a penalty leviable from the person, and the other a proceeding *in rem*, with which the person of the offender has, in theory at least, no concern, the first proceeding being against the maltster, the second against the malt; and then it may be said, that the 4 & 5 W. 4, c. 51, s. 6, being only an enhancement of the pecuniary penalty against the maltster, repeals, indeed, the 7 & 8 G. 4, c. 52, s. 1, so far as the pecuniary penalty is concerned, but leaves the forfeiture of the malt unaffected. This is a way of put-

(a) Leach's Crown Cases, 271.

ting the question ingenious and plausible, and the question may not be altogether free from doubt; but on the fullest consideration that I can give to the subject, it appears to me, that however plausible this argument may be, it ought not to be allowed to prevail. It is difficult for any one to read the former act, enacting the two penal consequences in the same sentence, and annexing them to the same act, and afterwards to read the subsequent act, enacting one penal consequence, and attaching it to the same act, and to avoid coming to the conclusion, that the legislature did substantially take a different view of the offence on the subsequent occasion, from that which it had taken on the former one. If the legislature had intended to retain the forfeiture of the malt as incident to the offence, I cannot but suppose that it would have said so on the latter occasion. For what end should it have been silent? But it has omitted to say, in the latter act, that the malt should be forfeited, and when it is added that the maltster and the malt are essentially different,—that an information *in rem* is essentially different from an information *in personam*,—that *non constat* the malt should necessarily belong to the person who is subjected to the pecuniary penalty,—and that any other person in the community, if he is really the owner, may become the claimant of the malt upon the trial in the information *in rem*,—all these statements must be admitted, and I repeat it, that they may create some doubt in the case,—a doubt, the solution of which may possibly be reserved for a higher tribunal; but I feel it impossible that we should shut our eyes, or to suppose that the eyes of the legislature were shut to the fact, that in at least 99 cases out of 100, the malt does really belong to the maltster, who sustains the pecuniary penalty—that the forfeiture of the malt did, therefore, really constitute a very material part of his punishment under the former act, and that the legislature, in the same sentence in which they preserve so remarkable a silence with respect to the malt, increase two-fold the pecuniary penalty on the maltster, as it were, in commutation of the forfeiture of the article manufactured. On the whole, then, I come to the conclusion that the legislature did not intend the enactments of the two statutes to be cumulative, but that those of the latter should be in substitution for those of the former. If this conclusion is not altogether free from doubt, I shall beg to repeat the judgment of Lord Wynford, in the case of the *King v. Winstanley* (a), and to adopt his Lordship's words:—"There is one principle upon which I will put this case. In all Revenue cases, let the officers of government take care that the legislature is made to speak plain and intelligible language. If the legislature is not made to speak plain and intelligible language, let not individuals suffer, but let the public. I am bound to say, if there is any doubt about these words, the benefit of that doubt should be given to the subject." It

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appears to me, therefore, that the points ought to be ruled in favour of the claimant in this case.

RICHARDS, B. concurred.

In order to obtain the decision of the Court of Error upon the questions raised in this case, they have been put upon the record in the shape of exceptions to the charge of the learned Baron, before whom the case was tried.

ERRATUM.—Page 361, for “in common with each other,” read, “in connection with each other.”

Wednesday, June 5th—Tuesday, June 11th.

ACTION FOR TITHE COMPOSITION SINCE 1 & 2 VICT.  
c. 119—PLEADING—STATUTE OF LIMITATIONS—  
VERIFICATION—NEGATIVE PLEA—ACCOUNT  
STATED—DEMURRER.

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Since the passing of the 1 & 2 Vict. c. 119, the plaintiff in an action for tithe composition must shew by his declaration that he comes within some of the exceptions mentioned in that act, otherwise the declaration will be bad, on general demurrer. Thus, the counts for tithe composition, and for tithes bargained and sold, contained in a declaration, which was entitled as of Hilary Term, 1839, were held bad, for the reason

above assigned; but a general demurrer taken to the whole declaration was overruled, upon the ground of its containing a count upon an account stated, which was held to be free from the objection; for although it described the plaintiff as rector, and the defendant as occupier of land within the parish, it did not necessarily follow that it was conversant about tithes or tithe composition.

A plea to the declaration in the above case, stating that parcel of the sum demanded was claimed for arrears of tithe composition due for the three years immediately preceding 1834, was held bad, the right to recover the arrears for those years not having been barred by the implied operation of the 1 & 2 Vict. c. 119.

A plea of the statute of limitations need not conclude with a verification.

November, 1830, until the present time; that the defendant did not hold as tenant at will, or under a demise executed after the 16th of August, 1832; that the defendant, by means thereof, became liable to pay to the plaintiff the sum of £19. 15s. 4d. for six years' and a half of said composition due and ending on the 1st of November, 1837; whereby, &c. The second and third counts were also for tithe composition. The fourth count was for tithes bargained and sold. The fifth count stated, that the defendant, as such occupier as aforesaid, afterwards, to wit, on the 1st day of December, 1837, at, &c. accounted, together with the plaintiff, as such rector, of and concerning divers other sums of money, before that time, and then due and owing from the defendant, as such occupier as aforesaid, to the said plaintiff, as such rector as aforesaid, &c.; and upon that accounting, the said defendant, as such occupier as aforesaid, was then and there found to be indebted to the plaintiff, as such rector as aforesaid, in the sum of £100, then and there due and payable by the defendant, as such occupier as aforesaid, to the plaintiff, as such rector. By means, &c.

The defendant pleaded five pleas, of which the fourth and fifth were to the following effect:—Fourth plea:—As to £9. 12s. 9d. parcel of the monies in the first count mentioned; and as to £9. 12s. 9d., parcel of the monies in the second count mentioned; and as to £9. 12s. 9d., parcel of the monies in the third count mentioned, *actio non*, because the said three several sums, and each of them, and every part thereof, are and is claimed by the plaintiff, for and in respect of arrears of composition for tithes due for the three years immediately preceding 1834, and not for any period subsequent to 1833. Verification and prayer of judgment. To this plea there was a demurrer, assigning the following causes:—That defendant had not confessed and avoided, or traversed and denied, that the several sums in the plea mentioned were, or that any of them was, due to the plaintiff, as alleged by the declaration; that the plea amounted to the general issue: that it was no answer as to the several sums in the plea specified, but was evasive and argumentative. Fifth plea:—As to £6. 8s. 6d., parcel of the monies in the first count mentioned; and as to £6. 8s. 6d., parcel of the monies in the second count mentioned: and as to £6. 8s. 6d., parcel of the monies in the third count mentioned; and as to £100, in the fourth count mentioned, and as to £100 in the fifth count mentioned, the defendant, by leave of the court, says, that the several causes of action in respect of the said several monies, and every part thereof respectively, did not, nor did any or either of them accrue to the plaintiff, at any time within six years next before the commencement of the suit. Wherefore the defendant prays judgment, &c. To this plea also there was a demurrer, assigning the following causes:—That defendant had not concluded his said plea with a verification, or to the country, so that the plaintiff could not

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shew any matter to avoid the allegations of said plea, or take issue upon them or any of them.

The Court having, early in the argument, intimated a strong opinion against the validity of the fourth plea, it was accordingly abandoned by the defendant's counsel, who fell back upon the declaration.

Mr. *Walter Berwick*, for the defendant.—The declaration is clearly bad on general demurrer, as it discloses no legal right of action in the plaintiff. The declaration, which is entitled generally of Hilary Term, 1839, claims tithes, and composition for tithes, although both had been previously abolished by the 1st section of the 1 & 2 *Vict.* c. 119, with certain exceptions therein specified. The plaintiff ought, therefore, to have set out the exceptions upon which he relied, as entitling him to maintain the action. The rule is thus laid down by Treby, C. J., in *Jones v. Azen* (a): “The difference is, where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to shew the proviso.” That rule has been recognised and confirmed by subsequent cases; *Spiers v. Parker* (b), *Gill v. Scrivens* (c). In the last case, which was a *scire facias* upon a judgment, Lord Kenyon said, that the writ (which is analogous to the declaration here), ought to contain all the circumstances that entitle the plaintiff to the execution prayed by him; so, in this case, the declaration ought to have stated that the action had been commenced before the 16th July, 1838, which was a circumstance essential to the plaintiff's right to maintain the action. As tithe composition was not a legal cause of action at common law, having been created by statute, the plaintiff was bound to bring himself within the exceptions of the statute by which it has been abolished; but it is manifest that the pleader in this case altogether overlooked the recent statute of the 1 & 2 *Vict.*

Mr. *Sterling*, for the plaintiff.—The mode of pleading adopted in the declaration is correct. The former acts relating to tithe composition must be considered as incorporated with the late act of the 1 & 2 *Vict.* The acts are in *pari materia*. Thus, the act of *Vict.* provides that nothing contained in it shall extend to any composition for tithes, for the recovery whereof any suit, action, or other proceedings shall have been commenced previous to the 10th day of July, 1838. The plaintiff is within this saving, but it is admitted that there is nothing on the face of the declaration to shew that. But then this proviso in the last act excepts from its operation suits resting on the former composition acts, and com-

(a) 1 Lord Raym. 120.

(c) 7 T. R. 27.

(b) 1 T. R. 141.

menced within time; and the rule is laid down in 1 *Chitty on Plead.* 255, 5th ed. "In pleading upon statutes where there is an exception in "the *enacting clause*, the plaintiff must shew that the defendant is not "within the exception; but if there be an exception in a subsequent "clause, that is matter of defence, and the other party must shew it, to "exempt himself from the penalty." Here the exception is not merely in a subsequent clause, but in a subsequent act forming a portion of the statute law of tithes. And applying the rule, as cited from *Jones v. Axen*, to the present case, the first statutes are in operation for the pleader to act on: they are the clause in favour of the pleader. The last statute may be fairly considered in the nature of the proviso. Also, in *Vavasour v. Ormrod* (a), Lord Tenterden says, "If an act of parliament or "a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and "distinct clause which operates as an exception." And so, if the law raise an exception to a general right, it need not be stated in pleading. 1 *Chitty on Plead.* 257. The fifth plea is defective, for the reasons assigned as causes of demurrer. All precedents of pleas of the statute of limitations conclude with a verification: and it is a rule of pleading, that the usual and established forms should be observed; *Stephen on Pleading*, 435. The rule specially applies to, and is laid down upon this particular plea; *Dyster v. Battye* (b). The defendant may say it is a negative plea, and therefore need not conclude with a verification: but this is merely a general rule stated by Mr. *Stephen*, in his work on *Pleading* as open to exception; and there is the express rule, that where new matter is introduced, the plea should conclude with a verification; 1 *Chit. on Plead.* 5th ed. 590; *Chandler v. Roberts* (c);—now, the time stated in the declaration being immaterial, as in the common case of the money counts, the plea of the statute of limitations introduces new matter, by stating that the cause of action did not accrue within a certain period, the period of legal limitation, and ought to conclude with a verification, in accordance with this express rule.

Mr. *Berwick*.—First, the fifth plea is a negative plea, and the rule is, that such a plea need not conclude with a verification, as a negative cannot be proved; *Stephen*, 435, 436, 3d ed.; *Co Lit.* 303; *Milner v. Crowdall* (d), which is exactly in point; *Brett v. Rigden* (e); and in the note to 5 *Nev. & Man.* 41, a form of plea like the present is approved of. Secondly, after reading the second section of the 1 & 2 *Vict. c.* 119, it is

(a) 6 B. &amp; Cr. 420.

(b) 3 B. &amp; A. 442.

(c) 10 Eng. 60.

(d) Shower, 338.

(e) 1 Plowd. Rep. 342.

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Impossible to doubt that the effect of that statute was, not only to abolish tithe and tithe composition, but also to repeal all former statutes connected therewith.

Mr. *Walter H. Griffith*, in reply.—First, as to the fifth plea, it is true, that pleas *merely* in the negative need not be *averred*, because a negative cannot be proved; *Co. Lit.* 303, *a*. But this plea is not merely in the negative, as *nil debet*, *non assumpsit*, or *nul tiel record* would be: *Obin v. Knott* (*a*); and it is no where said that the plea should not have some conclusion. The objection in *Milner v. Crowdall* was, that the plea did not conclude with a verification. It was there objected, that no bill had been delivered pursuant to the 1 *Jac.* 1, c. 7, and the court were of opinion that the statute might be given in evidence under the general issue, but the plea *may* have concluded to the country. The report is short. The objection was, not that there was *no* conclusion, but that the plea did not conclude with a verification. This case is referred to in *Buller N. P.* 145, as shewing that an act corresponding to the 1 *Jac.* 1 may be given in evidence under the general issue. Besides, that was an action of replevin, where the defendant, in his avowry, is actor, or, as it is there said, “*quasi* plaintiff, in which case he shall not aver his avowry, for it is not usual “for the plaintiff to aver his count, but the defendant must.” In *Hayman v. Gerrard* (*b*), which was debt on bond conditioned to account for all sums which should come to defendant’s hands, the latter pleaded that no goods came to his hands. The plea concluded with a verification, and yet, it was more purely negative than the present plea. The plaintiff replied, that a silver bowl came to defendant’s hands, and concluded with an averment, and not to the country, and it was held that the conclusion with an averment was proper. It is a general rule, that whenever new matter is introduced, the pleading must conclude with an averment, in order to give the other party an opportunity of answering it; 1 *Saund. Rep.* 103, *a*. And every plea must have its proper conclusion, which is either to the country or with a verification; 1 *Chit. Plead.* 474; *Com. Dig. Pleader, E.* 28; *Co. Lit.* 303, *b*. Both precedent and authority are against the form of this plea; *Lill. Ent.* 32, 478; *Lutwyche*, 243, 257; *Stephen*, 392, 3d ed.; *Knowles v. Stevens* (*c*). Secondly.—As to the declaration, it lay upon the defendant to shew that the plaintiff did not come within the exceptions contained in the late statute of the 1 & 2 *Vict.* The former statutes are not thereby repealed, but a statutable release is granted to tithe payers in certain cases. The cases cited by Mr. *Berwick* were actions for penalties; but the general rule is, that it is not necessary to state matter which would come more properly from the other side; *Com. Dig. Pleader, C.* 81; and therefore, no matter in defeasance of the action need be stated, for this

(*a*) *Fortesc.* 339.

(*b*) 1 *Saund. Rep.* 99.

(*c*) 1 *C. M. & R.* 27.

will come more properly from the other side; *St. John v. St. John* (a). So it has been decided that the statute of limitations must be pleaded, and that the plaintiff need not notice it in his declaration; *Stile v. Finch* (b); *S. P. per Jones, J., Hawkins v. Billhead* (c).—[RICHARDS, B.\* The statute of limitations bars the remedy, but does not take away the right; whereas here is a statute that extinguishes the right.]—The defendant's demurrer, which is one to the whole declaration, must, in any event, be overruled, as there is one good count, the fifth (which is upon an account stated), being free from the objections urged against the other counts.—[Mr. Berwick. The account being stated between the plaintiff, "as such rector," and the defendant, "as such occupier," "as aforesaid," the previous part of the declaration must be considered as incorporated with the fifth count, which must therefore be taken to relate to tithe composition.]—It may relate to glebe rent, or to many other things as well as tithe composition.

Mr. Napier, (*amic. cur.*) upon this point, referred the Court to the cases of *Dyne v. O'Neill* (d), and *Smith v. Forty* (e).

*Cur. advis. vult.*

*Tuesday, June 11th.*

RICHARDS, B.\* on this day delivered the following judgment:

The declaration in this case, which is in debt, consists of five counts. The three first are for tithe composition, and the fourth for tithes bargained and sold; the last is upon an account stated between the parties. The defendant, amongst other pleas not necessary to state, by his fourth plea, alleges that parcel of the tithes demanded are for the three years immediately preceding the year 1834, and insists that the plaintiff cannot recover tithes for these three years: in other words, he insists that the tithes for the years 1831, 1832, and 1833 are barred by the implied operation of the 1 & 2 Vict. c. 119, s. 1: and this conclusion is sought to be deduced from the enactment in that statute, whereby a power is given to tithe owners to apply for payment of the arrears of tithe composition due to them for the years 1834, 1835, 1836, and 1837, as against the residue of the Million fund, but not for any antecedent arrears. Now, when it is recollected that persons to whom arrears were due prior to 1834, had an option of applying under the Million act for these arrears, and waived their right so to do, I can see a very good reason, without adopting the construction of the act contended for by the defendant, why the legislature should decline to allow such parties now to come against the residue of the Million fund for these

(a) Hob. 78.

(b) Cro. Car. 381.

(c) Ibid, 404.

(d) Crawf. & Dix. Ab. N. C. 329.

(e) 4 C. & P. 126.

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arrears of 1831, 1832, and 1833, to the prejudice of persons to whom arrears remained due for subsequent years, and for payment of which latter arrears the residue of the Million fund was expressly dedicated by the statute. No such inference, therefore, can be drawn as that contended for by the defendant in this respect from the 1 & 2 *Vict.*, and in my opinion, a tithe-owner claiming compensation for the years 1831, 1832, and 1833, and bringing himself within some of the exceptions contained in that statute, preserving his rights to sue for arrears of tithe composition, has as full a right to proceed for the same, as for the composition of subsequent years;—and this brings me to the objection taken by the defendant, who has, upon the argument of the demurrer, turned round and objected, as he had a right to do, to the plaintiff's declaration. The defendant insists, that inasmuch as tithes, and composition for tithes, were all abolished and extinguished by the 1 & 2 *Vict.* except in certain special and excepted cases, it lies on the plaintiff to shew, by his declaration, that he comes within some or one of the exceptions contained in that act; and not having done so on record, the defendant insists that the plaintiff's declaration is bad, and that it should be so held upon general demurrer; and that, I confess, would be my view of the case, were it not for the fourth count in the declaration. Unquestionably, the recent act was intended to put an end to tithes and tithe composition, and to substitute, in lieu thereof, rent-charges, payable to the parties entitled, by persons having a perpetual estate or interest in the lands subject thereto, and to bar and extinguish all proceedings at law or in equity for the recovery of arrears of tithe composition, except in the particular cases mentioned and especially saved by the act. Now, it is under one of these exceptions in the first section of the act (the section abolishing tithe composition), that the plaintiff seeks to sustain his present action. His counsel say at the bar, that his suit was commenced prior to the 16th July, 1838, and no doubt that it is one of the cases excepted from the general operation of the statute:—but has the plaintiff shewn that in his declaration? No such thing. His declaration is entitled generally as of Hilary Term, 1839, and there is nothing upon the record from which it can be inferred that the action was commenced prior to July, 1838, or that the case of the plaintiff falls within the exception relied on. It is said, however, for the plaintiff, that it is the defendant who should shew the contrary by his pleading. It is argued that the act of 1 & 2 *Vict.*, doing away with and abolishing tithe compositions, and the right to recover the same, must be construed as if that act were a proviso, by way of exception in the general code of legislation upon the subject of tithes; but this is not, in my opinion, the true construction of this statute. It cannot be construed as a mere proviso by way of exception to any previous act of parliament establishing tithe composition; the whole purview of the 1 & 2 *Vict.* is revocatory of all prior

legislation on the subject, as well with respect to the party from whom, as the mode by which the rent-charge, the thing substituted in lieu of tithe composition, is to be recovered. It is quite impossible, therefore, to construe this statute as an exception to any previous act, or by any such analogy.

But, again, it is insisted by counsel for the plaintiff, that the court must take notice of the whole act, and that if there be any possible case in which the plaintiff could go on with a suit for tithe composition, it is enough, and that the court is not to intend that the case does not come within the exception, but leave it to the defendant to shew, in pleading, if he can, that the plaintiff's case is not within the exception contained in the statute.

My opinion, however, is different. I am of opinion that, in this case, the statute creates and makes a new code of law in respect to the rights and remedies for the recovery, not of that which, before the passing of the act, was called tithe composition, or of any arrear thereof, but prospectively, for that which was substituted in lieu of tithe composition, viz., the rent-charge. It abolishes and extinguishes tithe and tithe compositions altogether, except in certain special cases, and prohibits the taking or carrying on of any proceedings for the recovery of the arrears thereof. If there were any doubt as to the construction to be given to the first section of the act, the second section explains, that the intention of the legislature was, to extinguish tithe and tithe compositions, except as therein specially excepted and saved. Now, if that be the sound construction of the statute, and I think it impossible to argue the contrary, it appears to me to follow, that this is the very case in which a party, seeking to get out of the effect of a general law of this kind, should shew that he comes within some one of the exceptions specified in the act of parliament. The cases cited, and the general rule and principle of law and of pleading, are all the one way upon this point; 1 *Lord Raymond*, 80; *Gill v. Scrivens* (a), before Lord Kenyon and the court of King's Bench. The only question, then, is, whether this case falls within the principle established by these authorities; and, in my opinion, it most clearly and expressly does.

I am therefore clearly of opinion, that the general demurrer, taken *ore tenus* by the defendant to the plaintiff's declaration on this ground, would be good, were it not for the fifth count; but I am of opinion that the fifth count is free from all objection. That count is upon an account stated. It is true that it describes the plaintiff to be rector, and the defendant occupier of land in the parish; and if I were at liberty to speculate, I would be disposed to think that such an account was conversant about tithes, but it might have been conversant about other

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things. It might have been for glebe-rent or other dues, and, at all events, the court is not bound to conclude that it was for tithes; but had such account been settled before the 16th July, 1838, even for tithe composition (and the period of such settlement is laid under a *videlicet* to have been on the 1st day of November, 1837),—I am far from saying, that such a settlement of account would not have been sufficient to sustain an action upon an account stated, notwithstanding the passing of the recent act. The action in that case would not have been for tithes or tithe composition, but on an account stated. However, it is not necessary to decide that point, for, as I have said, the account may have been about other matters. Upon the ground, therefore, that there is one good count in the declaration, I must overrule the defendant's demurrer *ore tenus*, and allow the plaintiff's demurrer to the fourth plea, which, as I have said before, is clearly bad.

The plaintiff's demurrer to the fifth plea is for want of a verification.

The plea is the statute of limitations, and the authorities are any thing but satisfactory, or, I might say, consistent upon this point. It is said by pleaders, that there need be no verification to a negative plea. That is answered by counsel for the plaintiff, who says, that a purely negative plea must conclude to the country, and that that is the reason it need not be verified; but that is manifestly not the reason, for there are many negative pleas that are habitually concluded with a verification, and not to the country.

And a plea of the statute of limitations, I confess, appears to me to be a plea, if there be any such, that need not conclude with a verification,—for it alleges no new fact; it merely says that the plaintiff's cause of action did not occur within six years; and if that be the case, it is for the plaintiff to allege a new fact, to counterplead such plea, and this he may do, whether the defendant concludes with a verification or not. If the plaintiff neither takes issue on the negative plea of the statute of limitations, or replies some fact to take the case out of the statute, this court has nothing to consider but pure matter of law; and I know not what the plaintiff is to verify. He does not dispute that the plaintiff might originally have had a cause of action such as he alleges. He passes over that altogether—he does not allege that the plaintiff has done any act to release or bar his right or remedy, or that he, the defendant, has done so by any act of his: he merely says that the cause of action did not accrue within six years; and though it may be usual to conclude such a plea with a verification, yet, when the opinion of the court is required on the point, I feel bound to say, that in my opinion, a verification is not strictly necessary in such a plea; and such appears to have been the opinion of the learned gentlemen who reported *Graham v. Pitman* (a), in

(a) 5 Nev. & Mann. 41.

which I find the form of a plea to the statute of limitations given, in precisely the same words as those adopted in this case, and leaving out any verification, and doing so deliberately and on full consideration.

I overrule, therefore, the plaintiff's demurrer to the fifth plea.

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Monday, 10th June.

SCIRE FACIAS—JUDGMENT—STATUTE OF LIMITATIONS,  
3 & 4 W. 4, c. 27.—APPLICATION TO AMEND PLEAS  
AFTER DEMURRER.

GRAHAM v. SHAW.

MR. NELSON, on behalf of the defendant, moved that the defendant be at liberty to amend his 3d and 4th pleas to plaintiff's *scire facias* by applying the same to the original writ of *scire facias* which issued in this cause, instead of to the writ of *alias scire facias*, on which the defendant was actually brought into court, upon the terms of the defendant paying to the plaintiff the costs of the demurrers which had been taken to said pleas, amending them on the file, and also plaintiff's copy forthwith, and rejoining, if necessary, to any replication which the plaintiff might file to the amended pleas, so as to enable him to have a trial at the next assizes.

The original writ of *scire facias* issued in this case to the sheriffs of the city of Dublin, and was returnable on 11th of June, 1838. By the return to that *scire facias*, it appeared that defendant did not reside, and had no lands within their bailiwick. A *scire facias* reciting the former one then issued to the sheriff of the county of Down, and to the latter *scire facias* the defendant pleaded. By his 3d and 4th pleas, the defendant averred that no promise in writing, nor any payment of principal or interest had been made at any time within twenty years next before the issuing of the said writ of *scire facias*. To these pleas demurrers have been taken on several grounds.

It is admitted that these pleas are open to one of the causes of demurrer assigned, inasmuch as they should have alleged that no promise or payment had been made within twenty years from the issuing of the first *scire facias*, and not merely of the second. The pleas, however, can be easily amended so as to cure the objection, by introducing the words "first mentioned" before "*scire facias*" wherever it

Where a *scire facias* did not issue until after the expiration of twenty years from the entry of the judgment although a conditional order for liberty to issue it had been obtained before the expiration of that period, and the defendant pleaded two pleas, under which he could avail himself of the 8 G. 1, c. 4, and also pleaded two other pleas for the purpose of relying on the 3 and 4 W. 4, c. 27;—and a special demurrer was taken to the latter pleas;—the court refused to permit them to be amended on any terms, there being no affidavit of merits; and, it appearing that the effect of the proposed amendment

would be to enable the defendant to contend, that the plaintiff must not only apply for, and obtain liberty to issue the *scire facias* within twenty years; but, that it must actually issue within that time, or the judgment, if not otherwise saved, will be barred by the statute of the 3 & 4 W. 4, c. 27.



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occurs in the pleas. A consent was tendered to the plaintiff for his signature, containing all the terms that could be reasonably required.

Mr. *M'Mechan* opposed the motion. The judgment was entered in Easter Term, 1817, and it appears in the margin of the roll to have been marked on the 24th of May, in that year. The application which the rule of the court requires for liberty to issue a *scire facias* to revive it, was made on the 4th of May, 1837, and therefore, within the twenty years. But as the court granted a conditional order only, which could not be made absolute until the 12th of June, the *scire facias* was not, consequently, issued until the twenty years had expired. If the court consent to the proposed amendment, it will have the effect of enabling the defendant to contend, that applying for liberty to issue a *scire facias* is not a proceeding within the meaning of the late act.\* The defendant has made no affidavit of merits. He has pleaded two pleas of payment, under which he will be entitled to prove what he himself does not venture to swear, viz.—that the debt has been actually paid, as well as to rely on the old statute of limitations as a bar. This case does not differ in principle from the case of *Domville v. Lane*, decided in this court (a). There can be no difference between adding a plea and amending one. The amendment is substantial, although it can be made in a few words. In *Domville v. Lane*, the court refused to consider the statute of limitations a plea to the merits. The principle is, that the court will not assist a party, even to cure a mistake of counsel, when doing so is not in furtherance of justice.

Mr. *Nelson*, in reply.—*Domville v. Lane* is distinguishable from this case, as it was there manifest that the debt was unpaid, and the party attempted to introduce a substantially new defence. In that case there was no plea of the statute on the record.—Here there is, and we only seek to correct a mere oversight, by making the pleas what they were originally intended to be.

RICHARDS, B.†—In *Domville v. Lane*, it was plain to demonstration that the debt was due. What is there said by the court must be taken in reference to that particular case; and when it is stated that the court did not feel inclined to yield to the argument, that the statute should be considered a plea to the merits, the observation could only have been intended to apply to the particular case then before it, as it might or might not be a plea to the merits, according to circumstances. In many cases there can be no better plea than the statute of limitations. This case, however, is peculiarly circumstanced. The judgment was actually entered on the 24th of May, 1817—the application to revive was within

\* 3 & 4 W. 4, c. 27, s. 40.

(a) 1 Crawf. & Dix. Ab. N. C. 182.

† *Solus*.

twenty years; but the act of the court, in granting merely a conditional order, disabled the party from issuing his *scire facias* within that period. The plaintiff was thus placed under a disadvantage, from which he has since recovered,—and by the slip which has been made by the defendant in his pleading, the plaintiff has in his turn gained an advantage, of which I think we cannot, in justice, now deprive him by permitting the proposed amendment. My opinion is formed with reference to the facts of this particular case; and under the circumstances, I think it right to say,

No rule on the motion.

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### NOTICE OF BAIL—PRACTICE.

#### COUGHLAN *v.* DEVINE.

Mr. ROGERS objected to the notice of bail, upon the ground of its misdescribing the bail, who were termed “house-holders” instead of “house-keepers,” contrary to the G. R. of Hil. 1832.

There is no distinction between the words—“house-holder” and house-keeper,”—in a notice of bail.

RICHARDS, B.\* said he understood that BARON PENNEFATHER, in a case before him,† had overruled the distinction which had been theretofore considered as existing between these words.—His Lordship expressed his concurrence in that decision, and accordingly, overruled the objection in the present case.

\* *Solus.*

† See that case *ante* p. 239. See also the cases in *note*, *ibid.*

*Monday, June 10th.*

### AFFIDAVIT TO HOLD TO BAIL—JURAT—PRACTICE.

#### CREAL *v.* DICKSON.

The defendant was arrested and held to bail on the 14th of April, 1839, but did not obtain the usual rule, that the plaintiff should shew

The *jurat* of an affidavit to hold to bail in this court, in the following

form—“sworn before me, at” &c. “in the county of” &c. “by virtue of a commission for taking affidavits in said county, and I know the deponent, out of her Majesty’s Court of Queen’s Bench, in Ireland.”—“J. K. Commissioner:” *Held*—not to be sufficient, although the affidavit was entitled—“Law Exchequer.” The defendant, who had been arrested and held to bail upon such affidavit was discharged from custody, although he had allowed a term to elapse before obtaining the usual rule to shew cause of bail.

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cause of bail, until the 8th of June. The affidavit to hold to bail was entitled "Law Exchequer," and the *jurat* was as follows:—

"Sworn before me at Belfast, in the county of Antrim, this 22d day of March, 1839, by virtue of a commission for taking affidavits in said county, and I know the deponent, out of her Majesty's Court of Queen's Bench, in Ireland."

"J. K. Commissioner."

Mr. *Nelson*, for the defendant, now objected to the affidavit, upon the ground of insufficiency in the *jurat*, which did not state that it was sworn before a commissioner of the court.

Mr. *McMechan*, *contra*.—This affidavit is undoubtedly irregular, and if the defendant were in a condition to claim the advantage of that irregularity, the cause of bail must be disallowed. But he has allowed a term to pass without making the application, and he is now too late to object, on the ground of irregularity; *Carmichael v. Owens* (a). The only question then, is, whether this affidavit be an absolute nullity. It is entitled in the court, and sworn before an officer of the court, who states he took it by virtue of a commission. If the *jurat* stopped with the word "commission," the court would correct the entitling of it in the court with the notice of the commission, and infer it was out of the court in which the affidavit purports to be sworn. An affidavit to hold to bail, not entitled in any court, but sworn in Scotland, before a commissioner, who stated himself to be a commissioner, by virtue of a commission from the Courts of Common Pleas and Exchequer, was held sufficient; *White v. Irving* (b). That case is exactly the converse of this; but is much stronger, because there the inference was, that the affidavit was sworn in one of two courts, out of which the commissioner had a commission: here the inference is, that the commissioner has his commission out of the court in which he takes the affidavit. *Lessee Fry v. King* (c), shews that documents of this description are not scanned by the court with such excessive strictness. It is the officer's duty to inspect the affidavit, and ascertain whether it has been sworn before the proper person, and if there is any irregularity, to reject it. But this affidavit is now upon the file of the court, and the court is bound to have judicial knowledge of its having been sworn before its own officer.\* The form of the *jurat* is certainly irregular in adding repugnant and insensible words after the word commission, but by rejecting those the affidavit becomes substantially right,—and all that is now necessary to be established is, that it is not an absolute nullity.

(a) 6 Law Rec. 2d ser. 139.

(b) 2 Mees. & Wels. 127.

(c) Smith & Bat. 86.

\* See *Shepherd v. Fitzhenry*, 1 Huds. & Br. 105, and *Thoroughgood v. Gould*, 2 Fox & S. 106.

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RICHARDS, B.\*—Whether it be merely irregular, or altogether a nullity, I think, for the sake of example, the defendant ought not to be kept in custody under it. It behoves the plaintiff's attorney to be reasonably careful with respect to the affidavit by which the defendant is to be deprived of his liberty, which can only be done by a proper affidavit sworn before an officer of this court; and it is incumbent on the attorney for the plaintiff to be careful that it is such a document as the court will sanction. To say that the officer ought to refuse every affidavit that is irregular, is going too far. If he happens to perceive it, unquestionably, he ought to do so;—but in the detail of business, it would be impracticable for the officer to examine every affidavit that is filed. The party who files an affidavit does so at his peril. It has been said that the court is bound to have judicial knowledge of its own officers. The rule in cases of this description is, that any one acting under a limited and special authority ought to shew upon the face of the document itself, that he has authority to do the particular act. No doubt, the application might have been brought forward at an earlier period, but I do not think it is yet too late. For example's sake, I am bound to yield to the objection that has been taken to this affidavit. Therefore,

Disallow the cause of bail, but without costs.

• *Solus.*

*Coram* PENNEFATHER, B., in Chamber.

*Friday, 5th July.*

# PRACTICE—SECURITY FOR COSTS BY DEFENDANT IN EJECTMENT ON THE TITLE—SETTING ASIDE DEFENCE.

LESSEE STEWART *v.* BARTHOLOMEW.

Mr. T. K. LOWRY moved that the defence taken in the name of the defendant in this cause, might be set aside, with costs, or that the said defendant might be obliged to give security for the costs of the action. The affidavit of the lessor of the plaintiff, on which the motion was grounded, stated that the defendant, on the 1st of June, 1837, executed to him a mortgage of the lands for which the ejectment was brought, and that having suffered a considerable arrear of rent and interest to accrue due thereon, he, about the 1st of May last, absconded to America, leaving the mortgaged lands in the possession of two persons named Andrew Spear and James Spear; that the ejectment in this cause, which was brought for the recovery of the mortgaged lands, having

A defence taken to an ejectment on the title, in the name of a person served with the ejectment who has subsequently gone out of the jurisdiction, will be set aside, unless security be given for costs, where it appears that the defence has been taken in his name by evading costs

other persons served with the ejectment, for the purpose of

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been served on both the mortgagor and the Spears, who then had the possession and refused to deliver it up, defence was taken in the name of the mortgagor for all the lands; that such defence was taken, as he verily believed, solely at the instance and expense of the said Spears, for the purpose of enabling them to carry off the growing crops, and that it was taken in the name of the mortgagor, instead of their own name, in order to prevent his having any remedy against them for the costs of the suit; and thereby to deter him from bringing down the record to trial, as from the property being mortgaged to its full value, the costs must, eventually, come out of his own pocket; that the Spears were treating the lands in an unhusbandlike manner; and that they had no just or lawful defence to make to the ejectment. In support of the motion, the cases of *Lessee Pilkington v. Scott* (a); *Doe d. Vaughan v. Richardson* (b); *Doe d. Greer v. Kelly* (c), and *Lessee Henderson v. Hagan* (d), which were, however, cases of ejectment for non-payment of rent, were referred to. The case of *Lessee Evans v. Reilly* (e), was also cited, in which the court stated that although, as a general rule, it had no authority to compel a defendant in ejectment to give security for costs; yet, that there might be special cases, forming an exception to this rule, in which the defendant would be compelled to give such security.

Mr. *Ferguson*, *contra*, opposed the motion, on the affidavit of Andrew Spear, which stated that he had, previous to the defendant's departure for America, purchased from him the crop then in the ground, for a sum of £50; that the defendant had also given him authority to sell the lands, and to pay off the plaintiff's mortgage, and other debts due by him at the time of his leaving the country, but that the plaintiff had refused to join him in such sale, and that defence had been merely taken in the name of the defendant, to give time to effect a sale of the mortgaged lands under the defendant's own authority. But the affidavit did not state that such defence was taken by the authority of the defendant. The case of *Jack d. Gilston v. Howard* (f), was cited against the motion.

PENNEFATHER, B.—Let the defendant give security for costs within four days, or, in default thereof, let the said defence be set aside with costs, and the costs of this motion, to be paid by Andrew Spear and James Spear, the tenants in possession of the lands and premises in the ejectment mentioned; and let the lessor of the plaintiff be at liberty, notwithstanding this order, to serve notice of trial for the next Assizes.\*

(a) 4 Law Rec. 2 ser. 208. (b) 2 Hud. & Bro. 117. (c) Ib. 118, n.  
(d) ante. p. 231 (e) ante. p. 230. (f) 2 Fox & S. 127.

\* The latter part of this order was rendered necessary, by the circumstance, that the time for serving notice of trial would expire before the four days in which the security was ordered to be given could run out. No security being given within the time limited by the rule, the defence was accordingly set aside and judgment marked.

## QUEEN'S BENCH.

*Saturday, June 22d.*

### PRACTICE—FRIVOLOUS DEMURRER—TAKING OFF THE FILE—JURISDICTION IN CHAMBER.

*In Chamber, coram Burton, J.*

SCULLY v. O'BRIEN.

To a declaration in trespass a general and special demurrer had been taken, which was filed on the last day of Trinity Term. A notice was served on defendant's attorney, stating that counsel would, in Chamber, apply for liberty to set aside the demurrer as frivolous and vexatious, and mark judgment:

A Judge in Chamber has no jurisdiction to set aside a demurrer, although it should appear frivolous, and merely filed for the purpose of delay.

Mr. *Hobart* accordingly, on this day, before Mr. Justice BURTON, in Chamber, moved that the demurrer to the plaintiff's declaration should be set aside, and that judgment should be entered, as it must be admitted to be frivolous, and was obviously intended for delay, and for the purpose of preventing a trial at the ensuing Assizes at Nenagh, in the county of Tipperary, where the venue in the action was laid.

Mr. *M. O'Donnell*, for the defendant, having objected to the notice, which should be in the alternative that the demurrer be set aside, or that it should be argued forthwith, contended that, even if he admitted that the demurrer was frivolous and untenable, yet, that a Judge in Chamber had no jurisdiction to hear it argued, or to set it aside, and relied principally upon the case of *Foster v. Burton (a)*.

BURTON, J. having read the case, said it was an authority by which he would be guided, and unless it was overruled by a subsequent decision, the demurrer should stand. At the request of counsel for the plaintiff, the motion was directed to stand over until next day, in Chamber, to give him an opportunity of finding any subsequent case overruling the decision in *Foster v. Burton*:

Accordingly, on Saturday, the 1st of July—Mr. *Hobart* having admitted that he was unable to produce an authority against that decision, submitted that it was not satisfactory, or one which should be considered as binding.

3 Tyr. 338; 1 Dowl. P. C. 683.

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BURTON, J.—Without giving any opinion as to the propriety of that decision ; it is one by which I shall be bound. Let the demurrer therefore stand, and no rule upon this motion.

No rule.

In Chamber, coram BURTON, J.

*Monday, July 7th.*

PRACTICE—EJECTMENT—AMENDMENT OF  
 DECLARATION.

Lessee of an Infant, by his Guardian and next Friend, *v.* SMITH.

Leave was given to amend a declaration in ejectment on the title after defence was taken and notice of trial served.

THIS was an ejectment on the title. The defendant had appeared and taken defence, and notice of trial served.

Mr. *Hobart* moved for liberty to amend the demise in the declaration in ejectment, by striking out the words “an infant of tender years by his guardian and next friend ;” or for liberty to add a new demise on the terms of paying the costs of the amendment.

Mr. *M. O'Donnell*, on the other side, submitted, that the application was now too late; that defence was taken so long since as the 28th of May; but, at all events, the costs of the motion, and of the appearance and defence should be paid; and that the notice of trial should be withdrawn.

Leave given to amend, on terms of paying the costs of defendant's appearance and defence, the costs of that motion; and that defendant should be at liberty to withdraw or amend his defence if necessary.

## CHANCERY: PETTY-BAG SIDE.

*Trinity Term, 1839.*

THE QUEEN

v.

CHARLES HAROLD WALKER, Heir-at-Law, and DAVID DALY,  
Personal Representative of WILLIAM LEWIS WALKER, deceased.

SCIRE FACIAS on a recognizance. Plea thereto: *payment* of the sum named in the recognizance. Demurrer to the plea, and joinder in demurrer.

Payment is a  
bad plea to *sci.*  
*fa.* on a recog-  
nizance.

SCIRE FACIAS.—“Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, &c. To the sheriff of the county of the city of Dublin, greeting—Whereas on the 5th of July, in the year of our Lord 1814, and in the 54th year of the reign of George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, &c. James Harold Walker, of the city of Dublin, gentleman; William Lewis Walker, and Richard Cotton Walker, esquires, came before William Henu, esquire, one of the Masters of the High Court of Chancery of Ireland, and jointly and severally acknowledged themselves to be indebted to the said Lord the King in the sum of £700, good and lawful money of Great Britain, to be paid to the said Lord the King, his heirs and successors, which, if they neglected to do, they willed and agreed that the said sum of £700 be levied and recovered of and from them, and every of them, their and every of their manors, messuages, lands, tenements, hereditaments, goods and chattels, wheresoever they shall be found within the said kingdom of Ireland, to the only sole and proper use of the said Lord the King; his heirs and successors, as by the said recognizance of record, and enrolled in our said court of Chancery, on the 5th day of July, in the said year of our Lord 1814, may appear, *which said sum of £700 the aforesaid James Harold Walker, William Lewis Walker and Richard Cotton Walker, have not, nor hath either or any of them yet paid, or caused to be paid, to his said Majesty, George the Third, during his lifetime, or to his late Majesty, William the Fourth, during his lifetime, or to us, since their decease:* and whereas the said William Lewis Walker is since dead. Now we, being desirous that justice should be done in the premises, do command you, that by good and lawful men of your bailiwick, you do make known to C. H. Walker, the heir-at-law, and David Daly, the personal representative of the said William Lewis Walker, deceased, that they do appear in our said court of Chancery, on Monday, the 15th day of April next, having to shew cause, if any they can, wherefore we should not have execution against them for the said sum of £700, according to the tenor and effect of the recognizance aforesaid, if we think fit; and further to do and perform whatever shall be thought



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necessary in the premises, in our said court, and have you then there the names of those by whom you shall so cause it to be made known to them, and also this our writ.—Witness, Constantine Henry, Marquess of Normanby, our Lieutenant General and General Governor of Ireland, at Dublin, the 11th day of January, in the second year of our reign.”

Sheriffs' Return.—“By Edward Reilly and George Flanagan, honest and lawful men of our bailiwick, we made known to the within-named C. H. Walker and David Daly that this before our Lady the Queen, on the day at the place within mentioned, to shew cause as within directed, as by the said writ we are commanded.—So answer, G. B. Grant, Despard Taylor, sheriffs.”

*Plea: payment of the sum named in the recognizance.*

“And the said Charles Harold Walker and David Daly come and say that her said Majesty ought not to have execution against them, for the said sum of £700, in the said recognizance mentioned, as in said *scire facias* prayed as aforesaid, because they say that the said recognizance was acknowledged, subject to a condition thereto annexed, and thereunder written and subscribed, whereby, after reciting therein that by an order of his then Majesty's said court of Chancery, and made in the matter of Robert Doyle, a minor, and bearing date as in said condition mentioned, it was ordered that J. H. Walker should be appointed receiver of the rents, issues and profits of the lands and premises in said order mentioned, on his giving security, by recognizance, to be approved of by William Henn, esquire, then one of the Masters of his said Majesty's High Court of Chancery in Ireland, and now deceased, or before a Master Extraordinary in the country, to be first approved of by the said Master Henn, conditioned to account as is usual in such cases: it was declared to be the condition of said recognizance in said *scire facias* mentioned, that if the said J. H. Walker should, every Michaelmas term, and as often as he should be required by the said court, account, upon oath, for such part of said rents as he should from time to time receive, and should pay over to such person as the Lord Chancellor of Ireland for the time being should appoint or direct, such sum and sums of money as should at any time appear by such account or accounts, or otherwise to be in his hands, that then the foregoing recognizance should be void, otherwise to remain in full force and virtue in law, as by the record of the said recognizance and condition thereof remaining in the said court appears; and the said defendants in fact say, that after the enrolment of the said recognizance, and *before the suing forth of the said scire facias as aforesaid, to wit, on the 1st day of January, 1839, the said sum of £700 in the said scire facias mentioned, was, by the said Richard Cotton Walker, duly paid and satisfied, according to the tenor and effect of the said recognizance in the said scire facias mentioned, and this, the said defendants are ready to verify; wherefore they pray judgment if her said Majesty ought to have execution as aforesaid against them, as in that behalf prayed as aforesaid.*”

"And our Sovereign Lady the Queen saith, that the plea of them, the said Charles H. Walker and David Daly, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or prevent our said Lady the Queen from having execution against the lands and tenements, goods and chattels of the said William Lewis Walker, deceased, for the said sum of £700, according to the tenor and effect of the recognizance aforesaid, to which said plea, and the matters therein contained, in manner and form as the same are above pleaded, our said Lady the Queen is not bound to answer the same, and this our said Lady the Queen is ready to verify, wherefore, for want of a sufficient plea in this behalf, our said Lady the Queen prays judgment and execution against the lands and tenements, goods and chattels of the said William Lewis Walker, deceased, for the said sum of £700 in said writ of *scire facias* mentioned, according to the tenor and effect of the said recognizance, and soforth.

And the said defendants say, that the said plea by them in the behalf above pleaded and set forth, are sufficient in law to bar and preclude our said Lady the Queen from having execution against them, as aforesaid, and this they are ready to verify, wherefore inasmuch as our said Lady hath not answered the said plea, nor hitherto, in any manner, denied the same, the said defendants pray judgment, and that our said Lady may be barred, as aforesaid, from having execution against them, as prayed as aforesaid," &c.

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Demurrer.

Joinder in demurrer.

Mr. *D'Arcy*, for the demurrer.—The plea is bad. In *Kettleby v. Hales* (a) it was decided that payment could not be pleaded to a *scire facias* upon a judgment. That case was before the statute 4 *Anne*, c. 16, in England, to which the 6 *Anne*, c. 15, in Ireland, corresponds.\*

(a) 3 Lev. 119.

\* The 6 *Anne*, c. 10, Ireland, section 12.—Where any action of debt shall be brought upon any single bill, or where any action of debt on *scire facias* shall be brought on any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment may be pleaded in bar of any action or suit: and where an action of debt is brought upon any bond, which hath a condition or defeasance to make void the same, upon payment of a lesser sum, at a day or place certain, if the obligor, his heirs, executors or administrators, have, before the action brought, paid to the obligor, his executors or administrators, the

principal and interest due by the defeasance or condition of such bond, though such payment was not strictly made according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action, and shall be as effectual bar thereof as if the money had been paid at the day and place, according to the condition or defeasance, and had been so pleaded.

Section 13.—(*Pending actions on bond, with penalty, defendant bringing into court principal, interest and costs, discharged*).

Sections 12 & 13 of the English statute, 4 *Anne*, c. 16, are precisely similar.

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That statute altered the law as to a judgment, but did not touch the case of a recognizance: *Salkeld v. Abbott* (a). There one of the sureties had paid the whole debt. The question then arose between him and his co-surety, whether he was to rank as a *simple contract* creditor of his co-surety, for the moiety of the sum so paid, or as a *specialty* creditor. The officer reported him merely a simple contract creditor, but, on exceptions to the report, the court held, upon argument, that he was entitled to claim as a specialty creditor against his co-surety for the moiety of the sum so paid by him. There are only two good pleas to a recognizance, viz., *execution* at suit of the Crown, and, secondly, *satisfaction* on the record: *Gilb. on Executions*, 11; *The King v. Ellis* (b). In proceedings on a bail bond payment is a bad plea: *Scholey v. Mearns* (c).

*Argument for the plea:—That a recognizance intended to secure a private debt is within the 6th Anne, c. 10.*

Mr. Napier, in support of the plea.—Under the true construction of the statute of *Anne*, payment is a good plea to a *scire facias* on a recognizance: at common law we admit that payment was a bad plea, either in the case of a recognizance or a judgment; although in *Vesey v. Harris* (d) the Judges differed on that. Afterwards the statute of *Anne* removed the difficulty. The only question is, whether this case is within the statute. That seems to be admitted by the court of Exchequer, in the case of *Salkeld v. Abbott*, which has been cited against us: at all events, if the court of Exchequer is of opinion as contended by Mr. D'Arcy, this court takes a different view of the question, and recognises the distinction between the case of a recognizance actually put in suit by the Crown for the recovery of a *Crown debt*, and a mere *private demand*, like the present. The *King v. Ellis* was the case of a debt really due to the Crown; in *Ex parte Usher* (e) Lord Mannors adopted that distinction; and in another case (f), decided in this court, your Lordship said, "the instrument, though in form a recognizance, is really a security for the benefit of a party."—[LORD CHANCELLOR. The question there, I think, was, whether *prerogative process* was to issue or not.]—That case stood over, and on the ground of the distinction I contend for, between a public and private debt, the court made an order to discharge the party. The point came before this court again, in *Smith v. Pepper* (g). In *The King v. Ayres* (h), the principle that the demand is in fact a private one, though, in form, due to the Crown, is recognised. The intention of the statute of *Anne* was to prevent a double satisfaction: *Dowbiggen v. Bourne* (i), though the case of a judgment, shews that a recognizance is within the same mischief, and provided against by the statute. The dispute here is between the co-sureties. The words of the statute are, "any judgment."

(a) Hayes, 576, 582.

(c) 7 East, 148.

(e) 1 Ball & B. 199.

(g) 2 Law Rec. N. S. 23, 24.

(b) 1 Price, 23.

(d) Cro. Car.

(f) 1 Law. Rec. 21.

(h) 4 Burr. 2118.

(i) 2 Young & Coll. 462.

Now a recognizance is a judgment: *Melvins v. Reeves* (a). In *Wentworth* (b) there is the form of a plea of payment by the conuzor of a judgment. In *Hudson v. Stalwood* (c), Lord Hardwicke says, the defendant might have pleaded as we have done here.

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Mr. *Warren*, on the same side.—The case of a recognizance is within the fair construction of the statute of *Anne*. In *St. John's College v. Murcett* (d) the distinction between a public and a private debt is recognised, and also in *Rex v. Pritchard* (e). In *scire facias* against bail they may plead *payment* by the principal, or by bail (f). The form of the *scire facias* itself shews the validity of the plea. The *scire facias* must allege, and does allege, that the money has not been paid. To that we plead, by denying the allegation of non-payment, and asserting the fact that it has been fully paid. The effect of disallowing this plea of payment will be, that one surety will levy the *entire* amount from the defendant *Walker*, though at worst he is only liable to one half.

Sergeant *Greene*, for the demurrer, in reply.—The question is, whether, in strict point of law, the remedy on this recognizance is extinguished by the fact of payment, or not? If we made an unconscientious use of our legal right, it is for a court of equity, or a court of law, upon an *audita querela*, or a motion under the special circumstances, to restrain us. Per *Bushe, C. J.*, in *Dillon v. Farrell* (g). This *scire facias* could not issue without the leave from the equity side of the court. We applied, and were permitted to put in suit for one half of the amount, in pursuance of the well-known equity of a co-surety, to have all legal remedies against his co-surety, that are not extinguished in point of law: *Mayhew v. Crickett* (h). *Dowbiggan v. Bourne* supports our argument. The consequence of the argument used by the other side would be, that having the right to sue *because* we paid it, yet we are to be met by that very fact when we put the recognizance in suit. *Woods v. Creagh* (i) is one of the many authorities shewing that one co-surety has the same right against his co-surety that he has against his principal. Such a plea, no doubt, would be good to a bond. The common law rule rests on the principle that you could not discharge an obligation by any thing of a less solemn nature, and therefore that you could not, to matter of record, plead matter in *pais*.

A bond is different from a judgment: there is a day appointed for payment. The statute enabled the party to plead payment after the day: but a judgment has no condition, and nothing short of satisfaction

(a) Littleton's Rep. 899.

(c) Cas. tem. Hard. 124.

(e) Bunb. 269.

(g) Batty, 683.

(b) 7 Went. 75.

(d) 7 T. R. 264.

(f) Tidd, 1166.

(h) 2 Swans. 185.

(i) 2 Hog. 50.

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on the *record*, or execution on the record, discharged it at common law.

Then, with regard to the statute of *Anne*, it is said, that a *recognizance* comes within the term "judgment." They are not similar. If an executor paid a judgment before a recognizance he would be guilty of a *devastavit*. *Salkeld v. Abbott* is a direct authority on the point. That case was decided on great deliberation. The court referred to the officer to report the circumstances. The officer found that a *levari* had issued on the recognizance, which had not been executed, but that under the terror of it the money had been paid. The court held that it was not discharged at law, and not being so discharged, the surety was entitled to stand in the place of the Crown as a specialty creditor, and that the statute did not apply to a recognizance.

As to the form of the pleading, this is the usual form. The Crown has a right to say *none* of the parties have paid, because there is no satisfaction on the *record*.

Now as to the distinction between a Crown debt and a private debt, that distinction goes only to this extent, that in administering *equitable* relief, or on *motion*, the court will not allow prerogative process to be applied to a private debt.

As to the case of *bail*, there is no analogy. The common law reason does not apply to what is called a recognizance of bail, which is an entry that the party has been delivered into the hands of his bail. *The King v. Ellis(a)* decides that the English statute does not apply to a recognizance to the Crown.

*Cur. ad. vult.*

*Wednesday, June 12th.*

This being the last day of term, the LORD CHANCELLOR declared that the court would allow the demurrer, but did not then give any reasons. On a subsequent day,

*Monday, June 24th,*

The LORD CHANCELLOR again referred to the case, and said, the case in *Hayes* is, I think, conclusive on the point, that the plea is a bad one. It is an attempt to deprive the surety of his remedy for the moiety to which he is entitled as contribution from his co-surety. The entry will be that he shall be at liberty to levy to the extent of one half. The whole of this proceeding is under the discretion of the court. The record, in point of form, states that there was no payment by any one, but that is the common form in constant use. I have felt bound to allow the demurrer.

(a) 1 Price, 23.

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- 1 Where a party cannot be served with the summons in ejectment, the court will upon a proper affidavit, deem service by posting, &c., good service; but it will not make an order to substitute service in ejectment cases. *Lessee of The Earl of Derby v The Casual Ejector* 291
- 2 Ejectment—Ejectment for non-payment of rent—Right of re entry—Surrender of part of premises, 25 Geo. 2, c. 2. *Lessee Thompson v Home* 179
- 3 Ejectment—Taking defence to ejectment—Part and parcel—According to the practice in Ireland a party who has been served with an ejectment, and who takes defence thereto, is deemed to be in possession of the premises sought to be recovered by the ejectment. It is not necessary at the trial to give evidence of his possession. *Lessee of The Earl of Listowel v The Casual Ejector* 313
- 4 Ejectment on the title—Authority of receiver to serve notice to quit—Evi-

- dence of appointment of receiver.—  
*Lessee Crosbie v Barry* 232
- 5 The court will allow the plaintiff to amend his declaration in an ejectment on the title where no defence has been taken, without prejudice to the rules entered on the 2d declaration. *Lessee of Carroll v Ejector* 117
- 6 When separate defences have been taken to an ejectment, the court will order them to be consolidated upon terms. *Lessee Gregory v Archer* 97
- 7 In ejectment for non-payment of rent, the defendant was compelled to give security for costs, where it appeared he was a mere cottier, and that for the purpose of depriving the landlord of costs, defence had been taken in his name by the principal tenant, who had been dilapidating the premises since the ejectment was brought. *Lessee Henderson v Haghan.* 231
- 8 Where insolvent took defence to an ejectment brought by his assignee, the court refused to interfere, either by setting aside the defence, or by compelling the defendant to give security for costs, it appearing that in consequence of his refusal to give up possession of the premises, he still continued a prisoner, and had not obtained the benefit of the act for the relief of insolvent debtors. A defendant in ejectment will not be compelled to give security for costs, unless under very special circumstances. *Lessee Evans v Reilly* 230
- 9 Amendment in chamber of declaration. *Lessee of an Infant, by his Guardian, v Smith* 380
- 10 Defence to ejectment set aside, defendant out of jurisdiction, and not giving security for costs. *Lessee Stewart v Bartholomew* 377
- 11 Ejectment—Security for costs—Practice. *Duke of Devonshire v Ejector* 6
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- 4 Of notice of presentment. *Ledlie v Lockhart* 89
- 5 Evidence—Variance in. *Keely v Whitaker* 28
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Wrongful.

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### EXECUTOR

Passing securities. Where A. died, having two accommodation acceptances of B.'s out, and which did not become due until after his death, when a third person, who made himself liable as executor *de son tort* to A. took them up, by passing his own draft upon another person in lieu of them, and which it appeared B. took in satisfaction of the debt: *Held*, that the passing of these securities by the executor was a discharge of the assets to the amount of such securities, and so far a due administration of the assets by the executor. *Carrigan v Mullowney* 254

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### EXCISE

- 1 Information—Mandamus to magistrate. *The Commissioners of Excise v Thompson* 5
- 2 Excise—Forfeiture of malt found in unentered premises. *The Attorney General v Dunn* 357
- 3 Excise Information—Variance in. *See* titles CERTIORARI. MANDAMUS.

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- A judge in chamber has no jurisdiction to set aside a demurrer, although frivolous. *Scully v O'Brien* 287

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- 1 A party having been arrested on a marked writ, issued out of the court of Common Pleas, and a writ of detainer having been afterwards issued against him out of the Queen's Bench, a writ of *habeas corpus* issued out of the Queen's Bench to remove him from the gaol of Carrickfergus, where he was in custody. *Anonymous* 241
- 2 *Habeas Corpus*—Service of writ of. *In re Wildridge* 1

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- Distinction between, in giving notice of bail. *Foudrinier v Pike* 2

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- 2 Information for breach of excise laws. *Commissioners of Excise v Thompson* 5
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1 *Scire Facias* to revive a judgment of Hilary 1807—it was never revived or redocketed: the conuzor was entitled for his life to the interest of the sum secured by the judgment. The principal to go, upon his death, to his issue. The conuzor was discharged as an insolvent debtor. *Held*, that the represen-

tatives of the conuzor were entitled to revive. *Executors of Dillon v Kennedy* 297

2 Conditional order to set aside a judgment entered upon a bond and warrant, on the ground that they were forged. *Connors v Connolly* 244

3 The Queen's Bench will not grant an order for liberty to issue a *scire facias* to revive a judgment more than 20 years old, where there has not been any payment of interest, or any thing to take it out of the statute, except a written acknowledgment given since the expiration of the twenty years. *Brady v Fitzgerald* 295

4 A rule *nisi* will be granted to mark judgment against the terretenants notwithstanding plea that "A is heir and that no writ issued to summon him" if it be not verified by affidavit. *Hogg v Armstrong* 178

5 Where a party obtains a conditional order for judgment as in case of a non-suit and does not make it absolute, the court will not allow him to do so after an undertaking and after notice of trial served, although that notice be withdrawn. *Carey v Williams* 115

6 Where on motion for judgment as in case of non-suit after default, on a peremptory undertaking to go to trial at the ensuing sittings, he will be put under terms to pay the defendant the costs already incurred, the costs of the motion; and also that the defendant may enter up judgment without further motion, if the plaintiff fail in going to trial pursuant to undertaking. *O'Donohoe v O'Donohoe* 9

7 Where a cause has been entered for trial, but not tried, and the plaintiff has been guilty of no default, by withdrawing the record, or otherwise, the defendant cannot have judgment as in case of a nonsuit; his remedy is to bring the case to trial by *proviso*. The rule, in this respect, is the same both in town and country causes. *Wright and Perrin v Hodgkins* 268

8 A rule to stay proceedings until the payment of costs of not proceeding to trial, pursuant to notice, must be vacated before the defendant can apply for judgment as in case of a non-suit. *Read v Shew* 269

- 9 The court will set aside a regular judgment, where a party by a fatality has been prevented pleading in time; and although the time for pleading had been previously enlarged. *Ryan v Francis* 154
- 10 The court will set aside a judgment obtained on parliamentary appearance when there is a substantial question to be had between the parties, although no irregularity was alleged in the marking of the judgment or to entering the parliamentary appearance. *Heron v* — 51
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- Of an affidavit to hold to bail in the Court of Exchequer. *Creal v Dickson* 375

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- 1 The Divisional Justices of the Head Office of Police of the city of Dublin, have jurisdiction to hear and determine at all times, offences committed in the county of Dublin against the excise laws under the 7 & 8 G. 4, c. 53.—*PERRIN dubitante. The Queen v Pichering* 269

- 2 Jurisdiction—Compelling defendant to enter an appearance for a co-defendant out of. *Williams v Ansell* 277
- 3 Jurisdiction in chamber—A judge in chamber has no jurisdiction to set aside a demurrer although it should appear frivolous and filed for the purpose of delay. *Scully v O'Brien* 287

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- One month's notice of action against justice of peace. *Kelly v Collis* 67  
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- New trial between *Purcell v Nolan* 258
- 2 Notice to quit. Where in an ejectment on the title an agreement was given in evidence, whereby the defendant agreed to hold the premises for six years, which had just expired when the ejectment was brought, and by which he was to have the option of renewing for six years longer, and was bound to give six months' previous notice, if he intended to give up possession at the termination of the first six years, which it appeared he did not give;—*Held*, that the defendant was not entitled to a notice to quit. *Lessee Thompson v Andrews* 285
- 3 Landlord and tenant—Agreement between, to keep premises in repair. *Nixon v Denham* 100
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2 Mandamus—Medical superintendents' qualification—Dispensary—Mandamus to remove the names of two medical gentlemen, who had been elected as medical superintendents to an hospital, and place the name of a third candidate in lieu thereof. *The Queen v Fairtlough and Hallaran* 76

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4 A mandamus will be granted to compel magistrates to hear a second information for breach of the excise laws, although they have already dismissed one for the same offence, upon a technical objection. *The Commissioners of Excise v Thompson* 5

5 Mandamus to Grand Canal Company to inspect books. *The Queen v the Canal Company* 337

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- 5 Notice describing bail as house-holder. *Anonymous* 229
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A prohibition does not lie to the President of the Court of Conscience to restrain him from proceeding in an action of debt, in which the question of marriage arises incidentally. *Coghlan v Boland* 63

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- 2 Receiver. Evidence of appointment of. *Ibid*

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## REFORM ACT

Registering anew under.  
See title REGISTRY, *passim*.

## REGISTRY

- 1 The bare production of his former certificate by a party seeking to register anew under the 27th section of the Reform Act (2 & 3 W. 4, c. 88,) without any examination upon oath, amounts to *prima facie* evidence of his right. Any person qualified under the 18th section to oppose a claim of original registry, may oppose a claim of renewal of registry; and insist that the person producing the certificate, whether he be the claimant himself or his agent, shall submit to examination. In such cases of registry anew, no affidavit need be made by the claimant. When a claimant has been rejected by the barrister for any other cause than insufficiency of value, the duty of the Appellate court is, not to hear the case *de novo*, but merely to examine and decide upon the validity of the cause assigned. A claim-

- ant seeking to register anew under the 27th section of the 2 & 3 W. 4, c. 88, may cause his certificate to be produced by an agent, without his necessarily appearing in person. The bare production of such certificate by a third party is evidence of agency, and entitles him to claim a new certificate without any examination on oath, unless such examination be required by some person qualified to oppose a claim of registry. *In re Seton, and In re McClelland* 119
- 2 A party seeking to register anew, under the 27th section of the Reform Act ought to give in evidence the original certificate. It is not enough to refer to the original affidavit. *In re Rafferty* 279
  - 3 The order of rejection of a claim to register, when not grounded on insufficiency of value, ought to state the reasons which have influenced the court below in making it, and also so much of the facts of the case as bear upon those reasons. A notice, giving the description of the premises as in "Upper or Lower C.-street," *Held* insufficient. *In re Savage* 281
  - 4 Where the claimant's residence was stated in the notice of registry to be in "North Cumberland-street," and it appeared there were two streets, viz., "Upper N. Cumberland-street" and "Lower N. Cumberland-street," the notice was *held* defective. *In re Finlay* 137
  - 4 An administrator and one other of the next of kin lived in the house of the intestate. The administrator was allowed to register as a householder, it not clearly appearing that the occupation of the next of kin was in respect of his distributive share, so as to make it a joint occupancy. *In re Daly* 283
  - 5 The notice of registry stated the claimant's residence to be in "Bishop-st.," without stating whether it was in the city or county of D., the claimant actually residing in the county. By a rule of the Registering Barrister's Court, where the county was not mentioned in the notice, the presumption was, that the residence was in the city—*Held*, that the notice was defective, as misdescribing the claimant's residence. *In re Sinnott* 138
  - 6 Of Freemam. R. A. D. claimed to be

## REGISTRY.

registered as a person entitled to vote at elections of a member to serve in parliament for the city of Dublin, as a freeman by birth, and produced a certificate of admission as a freeman by birth, admitted at Michaelmas assembly, 1838, signed by the Town Clerk. Claimant having been sworn, was examined as to having taken the usual oaths before the Lord Mayor and Sheriffs, and his having obtained the Town Clerk's certificate of admission produced by him, but refused to answer any questions upon cross-examination touching the validity of his admission to the corporation in such capacity, for which reason he was rejected by the Registering Barrister—*Held* by the twelve Judges, that he was rightly rejected. The validity of the admission of a freeman claiming to register under the 2 & 3 *W. 4*, c. 88, may be questioned at the registry. *In re Disney, appellant* 139

- 7 Change of residence. Where a party having served notice of registry as a freeman changed his residence, he need not serve a new notice, although a sufficient time for so doing may intervene before the last day for serving notices. *In re Hall* 284
- 8 A salaried clerk occupying a house in such capacity is not entitled to register thereout as a householder. *In re Gorman* 282

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- 2 A writ of replevin will not be quashed where it issued to get back goods which

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- 3 Replevin—Action on replevin bond. *Igoe v O'Hara* 155
- 4 Replevin—Setting aside regular judgment in. *Ryan v Francis* 154

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- 1 Of re-entry. *Thompson v Home* 179
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1 38th New General, as to bonds and warrants of attorney.

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- 1 Practice—Sheriff's return—Amendment. *O'Brien v Fitzgerald* 200
- 2 Scire Facias—Practice—Service.—*Gower v Brett* 8
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- 6 Scire Facias—Practice—Affidavit of service—Judgment. *Wigmore v Wigmore* 103
- 7 Scire Facias—Payment is a bad plea to scire facias on a recognizance. *The Queen v Daly and Walker* 381
- 8 To revive judgment under the statute of limitations, 3 & 4 W. 4, c. 27—Application to amend pleas after demurrer. *Graham v Shaw* 373

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- 1 For costs by defendant in ejectment. *Lessee Evans v Reilly* 230
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- 2 Security for costs—Mariner in a replevin suit. *Corscaden v Stewart* 110
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- 3 Service of *scire facias*. Service of a *scire facias* to revive a judgment need not be personal. Service of this writ, by throwing it into the defendant's yard through an open in the gate was deemed good service under the circumstances of this case. *Hill v Stawell* 104
- 4 Service of *scire facias* five days before term.

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- 5 Service of notice. *Pepper & Locke v Newenham* 9
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- 1 A sheriff will not be ordered to make a return of a writ of *ca. sa.* against three defendants, where he has arrested two of them, and the plaintiff entered into a compromise with one of the defendants and took securities from him for part of the debt, and then discharged him, and the other defendant escaped; and where there were contradictory affidavits as to whether the bailiffs who effected the arrest were or were not the special bailiffs of the plaintiff. *Dwyer v M'Keogh and others* 3
- 2 Sheriff's return to *scire facias*. *O'Brien v Fitzgerald* 200

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- 3 3 *Hen.* 7, c. 2. Evidence of wife against husband—Abduction—Witness—Criminal law. *Tucker v Yore* 301
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- 7 43 *Eliz.* Local assessments. *Tomb v Commissioners of Belfast Police* 164
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- 9 19 *Car.* 1, s. 16. Action against Portrieve—Month's notice. *Kelly v Collins* 67
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11 17 & 18 *Car.* 2, c. 12, s. 3.

12 7 *W.* 3, c. 25, s. 9

13 6 *Anne*, c. 20, s. 11. Marking Judgment—Dilatory plea. *Hogg v Armstrong* 178

14 9 *Anne*, c. 15. *Scire facias* on a recognizance and plea thereto. *The Queen v Daly* 381

15 6 *Anne*, c. 16. Preventing taking away and marrying children against consent of parents, &c. *Tucker v Yore* 301

16 8 *Anne*, c. 9, Ir. similar to 4 & 5 *W. & M.* c. 21, Eng. Declaration against prisoner. *O'Donnell v Sweeney* 239

17 11 *Anne* c. 2, s. 2. Preventing frauds by tenants. *Lessee Thompson v Home* 179

18 4 *G.* 1, c. 5. Right of entry—Surrender of part of premises. *Ibid*

19 8 *G.* 1, c. 4. Revival of judgments—Statute of limitations. *Brady v Fitzgerald* 295

20 8 *G.* 1, c. 4. Revival of judgment of *scire facias*. *Dillon v Kennedy* 296

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22 8 *G.* 1, c. 6, secs. 5 and 4. Demurrer Effect of pleading over—Action in replevin bond. *Igoe v O'Hara* 155

23 1 *G.* 2, c. 9. Freeman—Corporation—Registry. *In re Seton* 119

24 5 *G.* 2, c. 4, s. 1. Frauds by tenants—Renewal of leases. *Thompson v Home* 179

25 9 *G.* 2, c. 11, s. 1. Clandestine marriage. *Tucker v Yore* 301

26 15 *G.* 2, c. 8, s. 10. New trial—Landlord and tenant. *Purcell v Nolan* 258

27 25 *G.* 2, c. 8. Evidence—Set-off. *Hamilton v Goold* 171

28 5 *G.* 3, c. 20, s. 4. Establishment of infirmaries. *The Queen v The Treasurer of an Hospital* 7

29 11 and 12 *G.* 3, c. 31, s. 15. Inspection of Grand Canal Company's books. *The Queen v Canal Company* 337

30 28 *G.* 3, c. 31 s. 2. Judgment as in case of nonsuit—Sealing record. *Graydon v Reardon* 355

31 33 *G.* 3 Ir. c. 42, s. 28. Debt on bond against heir of obligor—Insolvent. *Hewitt v McGeown* 84

32 33 *G.* 3, c. 56, s. 2. Mandamus to

- make applotment. *The Queen v The Ministers of St. Catherine's Parish* 70
- 33 35 G. 3, c. 30, s. 31. Pleading—Consideration—Collateral promise. *Blake-ney v Ware* 246
- 34 40 G. 3, c. 37. Police assessment. *Tomb v Commissioners of Police* 164
- 35 43 G. 3, c. 143, s. 1. Relative to justice of peace. *Kelly v Collis* 67
- 36 48 G. 3, c. 140, s. 2. Dublin Police—Jurisdiction of justices. *The Queen v Pickering* 298
- 37 56 G. 3, c. 100, s. 2. Service of writ of *Habeas Corpus*. *In re Wild-ridge* 1
- 38 59 G. 3, c. 92, s. 4. Jurisdiction of magistrates. *The Queen v Pickering* 298
- 39 1 G. 4, c. 87. Security for costs in ejectment. *Flynn v Ejector* 72
- 40 1 & 2 G. 4, c. 59, s. 8. Relief of insolvent debtors. *Aspinall v Arrott* 261
- 41 1 & 2 G. 4, c. 78. Acceptance of bills of exchange. *Ledlie v Lockhart* 89
- 42 4 G. 4, c. 63, 99, s. 34. Tithe-composition. *Pennefather v Lee* 25
- 43 6 G. 4, c. 42. Bank officers. *Keily v Whittaker* 28
- 44 6 G. 4, c. 79. Assimilation of currency. *Neville v Ponsonby* 204
- 45 7 G. 4, c. 52, s. 1. Excise entry—Forfeiture of malt. *Attorney General v Dunn* 357
- 46 7 & 8 G. 4, c. 53. Certiorari—Excise penalties. *The Queen v Hart* 112
- 47 3 & 4 W. 4, c. 67. Statute of limitations. *Brady v Fitzgerald* 295
- 48 3 & 4 W. 4, c. 37. Church temporalities. *Pennefather v Lee* 25
- 49 3 & 4 W. 4, c. 91, s. 27. Special Juries—Costs of. *Coghlan v Carney* 201
- 50 4 & 5 W. 4, c. 51, s. 6. Excise Penalties. *Attorney General v Dunn* 357
- 51 4 & 5 W. 4, c. 78. Appointment of receiver. *Crosbie v Barry* 232
- 52 6 & 7 W. 4, c. 116, s. 1. Grand Jury Rates—Repeal of in certain localities. *Jones v Hayes* 341
- 53 1 & 2 Vict. c. 109. Applotment of tithe composition—Discontinuing suit. *Purcell v Wigmore* 318
- 54 1 & 2 Vict. c. 119.—Action for tithe composition—Pleading statute of limitations. *Berresford v Loughnan* 364

## STATUTE OF LIMITATIONS

- 1 Pleading statute of limitations in an action for tithes—Statute 1 & 2 Vict. *Berresford v Loughnan* 364
- 2 Application to revive judgment under statute, and to amend pleas after demurrer. *Graham v Shaw* 373

## SUBSTITUTION OF SERVICE

- 1 Substitution of service of the summons in ejectment refused under the circumstances of the case. *Lessee of Connolly v Ejector* 38
- 2 Service on the conuzor of a judgment who has absconded from the country, of a conditional order for liberty to issue a *scire facias* to revive a judgment, will be substituted by serving his wife and son and receiver. *Molloy v Clarke* 38
- 3 The court will order service of a writ of *capias ad respondendum* to be substituted where there have been several ineffectual attempts made to serve the defendant. *Anonymous* 99
- 4 The court will deem the service of an ejectment for nonpayment of rent in Dublin, good service, the same having been posted on the premises, where all the parties to be served cannot be discovered, and every person interested who could be discovered was served, and also the receiver. *Lessee Barclay and Gumley v Ejector* 160

See titles EJECTMENT.  
SERVICE.

## SURRENDER

- Of part of premises. *Thompson v Home* 179

## SUSPENSION

- Of rent. *Smith v Kellett* 43

## \* TAKING OFF THE FILE

- A frivolous demurrer. A judge in chamber has no jurisdiction to set aside a frivolous demurrer. *Scully v O'Brien* 379

## TAXATION

- 1 When costs subject to. *Dunne v Tierney* 321
- 2 Taxation of costs between party and party. *Jones v Conyngham* 10

## TENANTS IN COMMON

- A vessel belonging to a number of part-

owners was forcibly taken by the minority out of the possession of the majority, and sent by the former upon foreign voyages, on one of which it was ultimately lost:—*Held*, that trover could be maintained. One tenant in common of a chattel cannot maintain trover for it against his co-tenant while the right of recaption remains, but when that right has been put an end to by the act of the co-tenant, the action of trover lies. *Knight v Coates and others* 53

## TENANCY

## 1 In common.

See title WILL.

2 *In re Gorman*

282

3 *Scully v O'Brien*

287

## TERM

Service of *scire facias* five days before.

*Murphy v Carberry*

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## TITLE

Ejectment on.

See titles EJECTMENT, 4, 5.

VENUE.

WILL.

## TITHE COMPOSITION

1 Action for tithe composition—Demurrer—Pleading tenancy from year to year, and joint tenancy. *Pennefather v Lee* 25

2 Applotment—Commissioner. A. and B., joint commissioners appointed under Goulburn's Act (4 G. 4, c. 99), duly made and lodged a certificate of composition, in 1831, but did not make any applotment thereon. A. having been subsequently appointed a sole commissioner under Stanley's Act (2 & 3 W. 4, c. 119), adopted the certificate, and duly made and lodged an applotment in 1833, pursuant to the latter act. B. afterwards affixed his signature in the registry of the diocese to the applotment made by A. alone, as sole commissioner. *Held*, 1st.—That A.'s applotment as sole commissioner under Stanley's Act was invalid and void, and that at the time of such appointment, and of his making the applotment as such sole commissioner, his authority as one of the joint commissioners originally appointed un-

der Goulburn's Act was still subsisting and valid. 2dly. That the applotment made by A. as such sole commissioner, notwithstanding his intention to act in making it under Stanley's Act, must be taken to have been made by virtue of his valid authority under Goulburn's Act. 3dly. That B. had authority, by affixing his signature to the applotment made by A. alone, to adopt it as his own act, though he had taken no part in the actual duty of making it. 4thly. That the applotment having been once made, it became the only standard for measuring the amount of composition payable by the parties liable thereto, and had reference back to the period of making such composition. *Semble*, that until the making of the applotment, it was optional with the party entitled to the composition, but not imperative on him to resort to the provisions of Goulburn's Act regulating the payments of composition according to the grand jury cess. *Armstrong v Killikelly* 270

3 Applotment. Where an applotment book stated the quantity of land contained in each of several holdings and the gross amount of tithe composition charged thereon respectively, but omitted to specify the acreable amount of such composition—*Held* that the applotment was not therefore invalid. Defendant on all former occasions paid his composition for the said land, and previous to the action promised to pay.—*Held*, it was not open to him to object to the applotment. *Purcell v Wigmore* 318

4 Where the rector of the parish was the sole claimant of the tithes. *Held*, that a certificate of the tithe composition under the 4 G. 4, c. 99, s. 25, was sufficiently certain, although it did not name or describe the party to whom such composition or any portion thereof was payable. *Lodge v Creagh* 315

5 Tithe Composition. Action for tithe composition since 1 & 2 Vict. c. 119. *Beresford v Loughnan* 364

## TOLLS

Action for the recovery of. *Minhear v O'Leary* 73

## TOTIES QUOTIES

Covenant for renewal.

See title LANDLORD AND TENANT.

## TRESPASS

- 1 Action between landlord and tenant—  
Distress for rent. *Purcell v Nolan* 258
- 2 Trespass—Insolvent's assignee—Action  
against by insolvent. *Aspinall v Ar-*  
*rott* 261

## TRIAL

By proviso. Judgment as in case of non-  
suit. *Wright & Perrin v Hodgins* 268

## TROVER

To recover shares of a ship—Tenants in  
common. *Knight v Coutes* 53  
See TENANTS IN COMMON.

## TRUSTEE

Action by a trustee—Consideration—Col-  
lateral promise. *Blakeney v Ware* 246

## UNENTERED PREMISES

Forfeiture of malt found in unentered pre-  
mises according to excise laws, under  
statute 7 & 8 G. 4, and 4 & 5 W. 4.  
*The Attorney General v Dunn* 357

## USE AND OCCUPATION

Action between landlord and tenant—  
Wrongful eviction—Suspension of rent.  
*Smith v Kellett* 43

## VALUE

Registering Barrister—Rejecting claim to  
register on the grounds of insufficiency  
of value. *In re Savage* 281

## VARIANCE

The defendant sued under the 6 G. 4, c. 42, was described in the commencement of the declaration as "the nominal defendant for and on behalf of a certain society or co-partnership called the Southern Bank of Ireland," and was stated to be sued as one of the public officers, "pursuant to the said statute in that case made and provided;" but in the body of the declaration the contract was stated as made with the defendant, without saying as public officer. At the trial, the proof was of a contract with the society or co-partnership. Held, that it sufficiently appeared on

the pleadings, that the defendant was sued in his official, and not in his individual capacity; and that, consequently, there was no variance between the contract stated and the contract proved.  
*Kelly v Whittaker* 28  
*The Queen v Harte* 112  
*Administrator of Kelly v Dolphin* 352

## VACATING JUDGMENT

As in case of nonsuit. *Hawkenworth v*  
*Boe* 7

## VENUE

- 1 The court will change the venue to an adjoining county in an action against a magistrate if there be reason to suppose that a satisfactory trial cannot be had in the county where the venue was originally laid. *Stewart v Lynar* 199
- 2 The Court of Queen's Bench will not change the venue in an action of ejectment on the title, where there have been two verdicts for the defendant. *Lessee of Jackson v Lodge* 161
- 3 Where the venue has been changed upon the usual affidavit, the party seeking to retain the venue is not bound to come in within four days after the rule to change. *Staunton v Magrath* 293
- 4 Where the venue was changed upon the usual affidavit, a motion to retain it, on the grounds of partiality in the jury. *O'Shaughnessy Executrix of O'Shaughnessy v Lambert & others* 104
- 5 The Court of Common Pleas will not change the venue in an action on a bill of exchange, although the defendant swears that he himself, and all his witnesses reside in the county to which it is sought to be changed. *Harnett v Torrens* 116

## VERIFICATION

Verification of statute of limitations—  
Tithes. *Beresford v Loughnan* 364

## VERIFYING AFFIDAVIT

Marking judgment—Dilatory plea. *Hogg v Armstrong* 178

## WAIVER

Waiver of notice of dishonor of bill of  
exchange. *Brush v Hayes* 327

## WARRANT OF ATTORNEY

- 1 When the warrant of attorney is joint and not several, the court will not allow the obligee to enter up judgment against the surviving obligor, although the obligor, who had died, was a minor when he executed the bond and warrant.

*Anonymous* 36

- 2 Judgment was entered up against the defendant on a bond, by virtue of a warrant of attorney, which bond and warrant were executed by the defendant to the plaintiffs, whilst the former was in custody on mesne process, at the suit of the latter, and without the presence of an attorney. The defendant having been subsequently arrested on foot of the judgment, took the benefit of the insolvent acts, and returned the judgment in his schedule. *Held*, that by returning the judgment in his schedule, the defendant waived the irregularity, viz., the execution of the warrant of attorney without the presence of an attorney on his behalf. *Dobson and Love v M'Daid* 236

- 3 Warrant of attorney, a taxable item in a bill of costs. *Dunne v Tierney* 321

## WARRANT AND BOND

- Judgment on forged bond and warrant—Application to set aside. *Connors v Connolly* 244

## WILL

- Construction of. Where the testator devised all his properties to his daughter for her life, "and in case she died without issue," then to his three nieces, daughters of his sister, "and in case any of them should die, the said pro-

perties to revert to the survivors or survivor of them," and in case the three should die," then to any other child his said sister should have; and then bequeathed the above properties to the issue of his daughter, "and in case she has more than one child, to go share and share among them, and in case all her issue should die, the said properties to revert as above between" his nieces; *Held*, that the nieces took under this will as tenants in common, and not as joint-tenants. *Lessee Scully v O'Brien* 287

## WITNESS

- Wife—Interested against husband—Evidence—Criminal law. *The Queen at the prosecution of Tucker v Yore* 301

## WRIT

- 1 Writ from the Queen's Bench and Common Pleas against prisoner—*Habeas Corpus*. *Anonymous* 241  
 2 Writ—Substitution of service of writ. *Anonymous* 99  
 3 Writ—*Scire Facias*—Special demurrer—Omission of words *Quo recuperet* in writ. *Wilson v Moriarty* 52  
 4 Writ of *Ca Sa*—Return to by sheriff—Joint judgment—Release. *Dwyer v M'Keogh* 3  
 5 Writ of error—*Coram Vobis*. *White v Mulhall* 355

## WRITTEN ACKNOWLEDGMENT

- To revive a judgment upwards of twenty years old. *Brady v Fitzgerald* 295

## WRONGFUL EVICTION

- Landlord and tenant—Suspension of rent—New trial. *Smith v Kellett and Kellett* 43

*L. R. 50.*



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